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88-402

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner

v.

EDWIN MEESE, Attorney General
for the United States
Respondent,

and

STEVE ASMAR and
METRO INSTITUTIONAL FOOD SERVICES, INC
Intervening respondents.

PETITIONER FOR A WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

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STATEMENT OF THE QUESTIONS PRESENTED

I

IS 18 USC 2515, PROHIBITING A STATE COURT FROM ADMITTING INTO EVIDENCE AT A STATE PROCEEDING MATERIAL PROCURED BY A PRIVATE INDIVIDUAL IN VIOLATION OF TITLE III, EVEN ABSENT ANY PARTICIPATION BY THE GOVERNMENT IN THE ILLEGAL ACQUISITION, AN UNCONSTITUTIONAL INTERFERENCE WITH RIGHTS RESERVED TO THE STATES UNDER THE TENTH AMENDMENT?

II.

IS THERE AN ARTICLE III CASE OR CONTROVERSY PRESENTED IN THIS DECLARATORY JUDGMENT ACTION WHERE THERE IS A DEFINITE AND CONCRETE DISPUTE WHICH IS NOT HYPOTHETICAL OR ABSTRACT, BETWEEN PARTIES HAVING ADVERSE LEGAL INTERESTS, AND IT IS DEMONSTRATED THAT PETITIONER HAS BEEN INJURED "AS A RESULT OF THE (CHALLENGED) STATUTE'S OPERATION"? (AND DID THE SIXTH CIRCUIT ERR BY REDUCING THE "CASE OR CONTROVERSY" QUESTION TO A FORMULA, CONTRARY TO THIS COURT'S STATEMENT IN BABBIT V UNITED FARM WORKERS, 442 US 289, 60 L Ed 2d 895, 99 S Ct 2301 (1979) THAT THE QUESTION IS ONE OF DEGREE AND IS NOT DISCERNIBLE BY ANY PRECISE TEST?)

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NOW COMES the State of Michigan, by

Frank J. Kelley, Attorney General, John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and prays that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals entered in the above cause on July 6, 1988.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Michigan is appended as Appendix A. The opinion of the Sixth Circuit Court of Appeals is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the District Court for the Eastern District of Michigan was entered on August 10, 1987. The judgment of the Sixth Circuit Court of Appeals was entered on July 6, 1988. The jurisdiction of this Court is invoked under 28 USC 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 8, provides, in pertinent part, that among the powers of the Congress is the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," as well as the concommitant power "to make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers...."

The Tenth Amendment provides, in pertinent part: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATUTORY PROVISION INVOLVED

18 USC 2515 provides that

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter (emphasis added).

STATEMENT OF THE CASE

This case was decided on cross-motions for summary judgment in the district court. Its factual background was well stated by the opinion of the district court:

"The complaint mainly addresses legal questions, not facts. Its statement of the facts of the underlying "controversy" is limited to the following:

> Plaintiff is in receipt of a recording of telephone conversations containing evidence of public corruption. The recording was delivered anonymously, and recorded by a person or persons unknown. 18 USC 2511 and 2515 are preventing investigation of these apparent acts of public corruption.

The "recording" is an audio cassette tape recording that has been the subject of

considerable dispute in civil matters on the Court's docket. Jo-Dan, Ltd., Inc. v. Detroit Board of Education, No. 86-CV-72565-DT; A & M Corp. v. Landmark Shoppe, Inc., No. 86-CV-72738-DT; Asmar v. Detroit News, Inc., No. 86-CV-73390.

Plaintiff did not allege that a prosecution is advancing in which a state prosecutor will attempt to introduce as evidence the recording or evidence derived therefore. The complaint did allege that the United States Supreme Court had previously declined to assert original jurisdiction over the matter.

Concerned that the case was not "ripe" for judicial consideration, the Court issued an Order to Show Cause on March 13, 1987, giving both parties an opportunity to comment on whether a "case or controversy" exists, as required by Art. III, Sec. 2, cl. 1 of the

Constitution. The Order noted that plaintiff appeared to be seeking "an advisory decree upon a hypothetical state of facts." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 325 (1936), cited in Advisory Committee Notes to Rule 57, supra. The Order also noted that a federal court will not declare on the constitutionality of aspects of an investigation in progress. See Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1100-03 (D.C. Cir. 1985). Finally, the Order stated that it does not appear that "all parties having an interest (in the declaration sought) or adversely affected (have been) made parties or be(en) cited." Advisory Notes, supra.

Plaintiff's response to the Order to Show Cause revealed that the Wayne County Citizens Grand Jury issued subpoenas in

an investigation related to matters disclosed on the tape recording of various telephone conversations, including officials of the Detroit Board of Education, intercepted in probable violation of 18 U.S.C. Sec. 2515. Following a motion in Wayne County Circuit Court to quash the subpoenas based on the Act, a Wayne County circuit judge supervising the grand jury quashed the subpoenas on June 18, 1986, citing the Act as the basis for his decision. Plaintiff filed the state court order quashing the subpoenas and a transcript of the extensive hearing on the motion. Plaintiff argued that the state judge's action created a "case or controversy" because it deprived the State of the only means of investigating the matters discussed in the conversations on the tape.

Defendant filed a response to the Order to Show Cause on April 13, 1987. Defendant, who is joined in the case because he is "charged with the responsibility of enforcing the laws of the United States," agreed with plaintiff that the matter is ripe for judicial consideration. Defendant asserted that purely legal questions are involved and unlikely to be clarified by further factual development. See Thomas v. Union Carbide Agricultural Productions Co,. 473 U.S. 568, 581 (1985); Babbitt v. United Farm Workers National Union, 442 U.S. 189, 300-01 (1979).

For the reasons stated on the record of the hearing on May 4, 1987, the Order to Show Cause was dismissed by Order of May 5. On May 22, the intervening defendants - one of whom admits involvement in the intercepted

conversations - moved to intervene either as of right, Fed. R. Civ. p. 24(a)(2), or by permission, Fed. R. Civ. P. 24(b)(2). The motion was granted on June 2.

Now before the Court are cross-motions for summary judgment. Fed. R. Civ. P. 56. There are no disputes over facts, as the case presents a purely legal question. The parties have ably briefed the issue, and the Court has conducted its own analysis beyond the scope of the briefs.

For the reasons that follow, defendant's motion is GRANTED and the case is DISMISSED."

On appeal, the Attorney General shifted his position and argued that no case or controversy was presented. The Sixth Circuit agreed, finding that "the plaintiff, in the instant case, must show

that 1)it has suffered actual or threatened injury, which it clearly has through the quashing of the subpoenas, and 2)the injury was the result of an act of the defendant....It is the second element which the plaintiff fails to satisfy....Plaintiff's injury did not result from any action taken by the defendant, the Attorney General of the United States." The court did not discuss the effect on its analysis, if any, of the fact that the Attorney General was not the sole defendant, a participant to the conversation in question having been permitted to intervene.

REASONS FOR GRANTING THE WRIT

I.

Delegated Powers and the Tenth Amendment

It is a settled principle that our federal government is one of delegated powers. As to Congress, Article I, section 8 enumerates the powers of the Congress, including, as the only power relevant here, the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," as well as the concommitant power "to make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers...." That the authority of Congress is limited to that expressed in Article I, Section 8 (again, including the authority to make

laws "necessary and proper" to the execution of the powers specifically enumerated) is made clear by the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (emphasis supplied).

Certainly it is undeniable that this nation was designed with a strong central government, whose reach has extended as history has unfolded. But this does not mean that federalism has no place. Though the problems engendered by a weak central government under the Articles of Confederation were sought to be remedied by the framers of the Constitution, see The Federalist No. 15, No. 22, Anti-Federalists versus Federalists, (J. Lewis, ed., 1967), the Federalists,

countering anti-Federalist claims that the States were unduly diminished by the Constitution, were careful to point out that even the act of establishing the Constitution was to be a federal act, as it would "result neither from the decision of a majority of the people of the Union, nor from that of a majority of the States. It must result from the unanimous assent of the several States that are parties to it..."(emphasis in original). The Federalist, No. 39, Anti-Federalists versus Federalists, p. 312. Madison also emphasized in the same Federalist paper that in the extent of its powers the proposed central government was clearly federal rather than national, "since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over

all other objects" (emphasis supplied). Anti-Federalists versus Federalists, p. 314. Further, in rebutting claims that the advantage under the proposed Constitution was heavily with the central government, Madison observed that he was "persuaded that the balance is much more likely to be disturbed by the preponderancy" of the States.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the States' governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State. The Federalist, No. 45, Anti-Federalists versus Federalists, p.319-320.

The result of the debate concerning the power of the central government was, at least in part, the Tenth Amendment, conceded ultimately by the Federalists as necessary to secure ratification of the Constitution. Schwartz, The Bill of Rights: A Documentary History, p. 505 (1971).

This brief history is familiar, and these principles not controversial--the federal government is one of delegated and enumerated powers, the States retain those elements of sovereignty not surrendered to the Federal government in the Constitution, and the Tenth Amendment specifically so assures. But what role does the judiciary play in all this, if any? Of what relevance are Garcia v San Antonio Metro, 83 L Ed 2d 1016 (1985) and South Carolina v Baker, 56 L W 4311 (1988) to the inquiry?

The Tenth Amendment and Judicial Review

The majority opinion in San Antonio Metro proposes no test by which to assess all claims of an exercise of Congressional authority in excess of Article I, Section 8, and thereby also in violation of the Tenth Amendment. The Court simply found that in that case, involving federal wage and hour regulations of employees of a municipally operated transportation system, the structure of the Federal Government itself provided adequate protection to the States by their involvement in the political process through the representatives elected from among their citizens. But did the Court mean that the political process is always sufficient for the protection of the States? As pointed out by Justice Powell

in dissent, the Tenth Amendment is, after all, a part of the Bill of Rights, and one would not expect the Court to defer to the constitutionality of a statute challenged under the Fourth Amendment on the ground that the individual was adequately protected by the political process which enacted the statute, so that the courts have no role in protecting the individual's constitutional right.

A rule that the judiciary never has a role in assessing claims under the Tenth Amendment, that Congress is always its own arbiter as to whether its legislation is consistent with a portion of the Bill of Rights, is inconsistent with all other principles of judicial review. The principle of judicial review of the constitutionality of the acts of Congress

was not, after all, created by Chief Justice Marshall in Marbury v Madison, 1 Cranch 137 (1803), but is to be found in the Constitution itself. See Raoul Berger, Congress versus the Supreme Court, (1969). Further, history also supports the power of judicial review. Hamilton, in The Federalist No. 78, speaking to the power of the proposed federal courts, spoke specifically of judicial review:

> There is no position which depends on clearer principles, than that every act of delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal...that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.
>
> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive

> upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution....It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning.... Anti-Federalists versus Federalists, p.391.

Perhaps the best gauge of the meaning of the Constitution is the record of the State Conventions which ratified the Constitution; that was the view of Madison and Jefferson. See Berger, at 126. Those records demonstrate that the States viewed the judiciary as a check on the power of the central government. Oliver Ellsworth, one of the Framers, stated in Connecticut that "If the

general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges...will declare it to be void." Berger, at 130. John Marshall, later the author of Marbury v Madison, spoke to the judicial authority at the Virginia Convention, one of the most hotly contested, particularly given the fervent opposition to the Constitution of Patrick Henry, and proclaimed "Has the government of the United States power to make laws on every subject?....Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard.

They would not consider such a law as coming under their jurisdiction. They would declare it void...." Page Smith, The Constitution, p. 256 (New York, 1980). George Nicholas, referring to fears regarding the "sweeping (necessary and proper) clause" declared "who is to determine the extent of such powers? I say, the same power which, in all well-regulated communities, determines the extent of the legislative powers. If they exceed those powers, the judges will declare it void, or else the people will have a right to declare it void." Berger, at 146. Samuel Adams, referring to a proposal that "powers not expressly delegated to Congress are reserved to the several states," stated in Massachusetts that this proposal would remove "a doubt which many have entertained respecting the matter, and gives assurance that, if

any laws made by the Federal Government shall be extended beyond the powers granted by the proposed Constitution...it will be...adjudged by the Courts of law to be void" (emphasis supplied). Berger at 131. Examples exist also from the other states.

The history surrounding the Bill of Rights reveals also that protection against the central government, against a feared "legislative despotism," was the principal motive. Both the rights of individuals and of the States were the concerns of those who insisted upon a Bill of Rights. Madison stated to the First Congress in offering the Amendments that the "guard against abuse" "must be leveled against the legislative, for it is the most powerful, most likely to be abused." 1 Ann. Cong. 454. In urging

their adoption he further stated that if the Amendments were "incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; **they will be an impenetrable bulwark against every assumption of power in the legislative or executive"** (emphasis supplied). 1 Ann. Cong. 456-457. To the extent permissible given San Antonio Metro, at least at this point in our Constitutional history, the courts should remain an "impenetrable bulwark against every assumption of power in the legislative" branch inconsistent with the Constitution, whether the inconsistency be with the First Amendment, the Tenth Amendment, or any other Constitutional provision. As stated by Madison in The Federalist No. 44, speaking to the question of the remedy if Congress should

exercise powers pursuant to Article I, Section 8 not warranted by the "true meaning" of the "necessary and proper clause," "I answer the same, in short, as if the State legislature should violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers" (emphasis supplied). The Federalist, p. 295, (New York, 1937). The courts, then, at least with the claim raised in this case, should determine in the first instance whether the Congress has exceeded its rightful authority. As put by Professor Bickel, summarizing

Chief Justice Marshall's views in Marbury, "to leave the decision with the legislature, he said, is to allow those whose power is supposed to be limited themselves to set the limits--an absurd invitation to consistent abuse." Bickel, The Least Dangerous Branch, The Supreme Court at the Bar of Politics, (Bobbs-Merrill, 1962), p.3. It would mean that the Tenth Amendment has been rewritten to say "Such power as Congress elects not to exert may to that extent leave something for state and local governments to do." Van Alstyne, 83 Mich L Rev at 1724, fn 64.

Economic Regulation, Police Regulation, and the Survival of National League of Cities

The test for measuring exercises of the commerce power against the Tenth Amendment developed in National League of Cities, 426 US 833, 49 L Ed 2d 245, 96 S

Ct 2465 (1976), at least as to economic regulations, was

> First, there must be a showing that the challenged statute regulates the "States as States'....Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty'....And third, it must be apparent that the states' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'

Hodel v Virginia surface Mining, 452 US 264,276-277, 69 L Ed 2d 1, 101 S Ct 2352 (1981), quoting National League of Cities. In Texas v United States,, 730 F 2d 339 (CA 5, 1984) the court observed that "in many articles of the Constitution the necessary existence of the States and, within their proper spheres, the independent authority of the States, is distinctly recognized." 730 F 2d at 356, quoting Lane County v Oregon, 74 US 71, 76, 19 L Ed 101 (1869). The court stated that commerce power

legislation that treats states in a manner inconsistent with the Tenth Amendment runs afoul of the constitutional assumption of federalism "because such acts force the states to administer congressional policy judgments. In effect such acts convert state agencies into tools of federal policy, and thereby threaten the independence of the states. The suspect characteristic of such acts, then, is that the states are compelled to carry out federal policy." 730 F 2d at 356. Congressional legislation preempting state law regarding private activity would not run afoul of principles of federalism, for state sovereignty is not implicated simply because the states cannot prevent the carrying out of federal policy, but is implicated if the states are forced to carry out federal policy. 730 F 2d at 357, fn 32.

A) Title III As A Police Regulation

Though strong arguments may be made that regulation of states regarding wages and hours of state and municipal employees violates principles of federalism, as witness the unusually vociferous dissents of four justices in San Antonio Metro, a distinction may be drawn between the federal/state relationship in that case and the case presently before the court. 18 USC 2515 provides that

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter (emphasis added).

Under 18 USC 2511 the interception or disclosure of a wire or oral communication by a private person, who is not a party to the communication, is a federal criminal offense. Under section 2515, then, evidence obtained by a private party in violation of section 2511, with no participation of any sort by any state or federal officials in the illegality, is inadmissible in a state court, as is any evidence derived from that illegally acquired communication.

The Senate committee report to Title III indicates that Congress had a dual purpose in enacting the legislation: "1)protecting the privacy of wire and oral communications, and 2)delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be

authorized." S Rep No. 1097, 90th Cong, 2d Sess, 66 (1968). As to section 2515, the congressional findings state that

> In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce it is necessary for Congress...to prohibit any unauthorized interception...and the use of the contents thereof in evidence in courts and administrative proceedings. s. 801(b), 82 Stat 211

The Senate report observed that aside from the criminal penalties of the statute, and the civil penalties, "The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings." S Rep No. 1097, at 69. Of course, where, as in the instant case, evidentiary use is sought by the State in a criminal proceeding brought on behalf of the State, and the

accomplished by the State, the notion of denying the "perpetrator...the fruits of his unlawful actions" has no force whatever.

Petitioner would observe here that one state court has noted the potential Tenth Amendment difficulty with section 2515. The Indiana Supreme Court had before it a wiretapping question arising out of a divorce action in In re Marriage of Lopp, 378 N E 2d 414 (Ind., 1978), cert den, 439 US 116 (1979). The husband in the case had taped his wife's conversations on the telephone, and when a separation occurred, confronted her with the tapes, threatening that if she did not consent to give him temporary custody of their son he would reveal the contents of the tapes to her former husband, which could cause the loss of her custodial rights in

her children from that marriage. When the wife subsequently claimed her consent to certain court orders was obtained by fraud and coercion, the husband moved to admit the tapes, and the trial judge granted the request. The court held the admission of the tapes proper against a challenge under Title III. In reaching its conclusion the court observed that "questions of federalism are necessarily involved in any application of s. 2515 to marital actions. This is because both the clear language and legislative history of the statute arguably foreclose any exceptions to its rule, as a matter of statutory interpretation." The court went on to state that "to the extent s.2515 can be read to the contrary (of its holding that the tapes were admissible), it would be an unconstitutional impairment of an

integral and essential function of state court judges, the entering of efficacious orders, free of fraud, which function here is related to a service traditionally performed by state judges and expected of them by their legislatures and citizens, the providing for the best interest of the children in domestic relations disputes." 378 N E 2d at 423. Though the court avoided a direct holding that 2515 is unconstitutional by finding that "We seriously doubt...that the national Congress intended such an interpretation and application of s.2515," in truth the court was correct in its observation that by its language the statute forecloses such an exception as the one it accepted. The only appropriate holding to support the admission of the tapes was that the statute was unconstitutional as applied

to the circumstance before the court. See contra, Halpin v Superior Court, 495 P 2d 1295, cert den 409 US 982 (1972).

Title III, based on the commerce clause, is a police regulation--it seeks to assure the privacy of wire and oral communications, and to assure that government interests in crime fighting are accommodated by a procedure for judicial authorization. To insure compliance with the police regulation, criminal penalties and civil penalties were created, as well as a rule of evidentiary exclusion, in order to deny the perpetrator of any unlawful wiretapping "the fruits of his unlawful actions in civil and criminal proceedings" (in criminal proceedings in the event that the perpetrator was a government agent). The regulations

involved in San Antonio Metro, on the other hand, are not police regulations at all, but may more appropriately be termed economic regulations.

Federal "police" regulation through use of the commerce clause has been, from the beginning, aimed at objectives far removed from the economic concerns that prompted the commerce clause, and, at the beginning, was directed to prohibiting certain kinds of interstate movements. See e.g. Champion v Ames ("The Lottery Case"), 188 US 321, 23 S Ct 321, 47 L Ed 492 (1903). As to this Congressional use of the commerce clause to justify police rather than economic regulation, Professor Gunther has stated that "Expansion of federal criminal jurisdiction raises some of the most sensitive problems of potential

impingement upon the values of federalism....the risks persist in the mounting modern resort to the commerce power as the basis for new federal criminal laws, relying both on the 'commerce-prohibiting' and 'affecting commerce' techniques." Gunther, Constitutional Law, p. 194-195 (9th ed.,1978).

The point here is not to challenge the ability of Congress under the commerce clause to enact the police regulations of Title III regarding wiretapping; clearly, that use of the commerce power is appropriate. But that the end is appropriate, does not mean that all means to that end are appropriate or legitimate. See NLRB v Jones and Laughlin Steel, 301 US 1, 81 L Ed 893, 57 S Ct 615 (1937), Garcia v San Antonio

Metro (dissent of Justice O'Connor), 83 L Ed 2d at 1054. Petitioner submits that the means employed in s. 2515, when applied to prohibit state courts from admitting evidence obtained by the State with no violation of the law by state officials, is illegitimate, and that this court should so declare.

B) The Test of National League of Cities

Though petitioner recognizes that San Antonio Metro overruled National League of Cities, the Court did also recognize that there exist "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause," 83 L Ed 2d at 1937, though declining to attempt to sketch the contours of those limits. Where

Congressional action requires the exclusion of evidence in a state court proceeding (or its admission, as the chapter also declares that any conversations obtained consistent with the chapter shall be admissible in any state court, precluding a state from having more severe limitations in the area of consensual recording or monitoring!), attention to the limits on federal action imposed by the "constitutional structure" is imperative. Petitioner suggests that it is appropriate for this court to view San Antonio Metro as applicable only to the class of cases there before it, as the Court itself declared that it was "going no farther" than to say that "in the factual setting of these cases" the exercise of authority did not offend the Constitution. San Antonio Metro involved

the use of the commerce power as a method of economic regulation, applied to state employees. The instant case involves, on the other hand, use of the commerce power as a method of police regulation, and a means of enforcement which infringes as directly as can be on State sovereignty. Petitioner suggests, then, that this court should find the test of National League of Cities applicable to cases of exercise of congressional authority under the commerce clause to enact police regulations where the exercise of authority regulates the States and not simply private conduct.

Continuing to apply National League of Cities to police regulations is appropriate given the recognition that federal criminal regulation is "among the clearest examples of federal regulation

of 'traditionally local' concerns." Gunther, at 194. Particularly here, where the regulation challenged is more than a criminal regulation of private conduct, but a prohibition upon the state judiciary to receive evidence in the possession of state prosecuting officials where that evidence was not obtained by the State through any violation of the federal statute, are "traditionally local" concerns involved. Section 2515 does not make conduct criminal; rather, in enforcing the statutory prohibition the section forces the state courts to become partners in the execution of the federal policy. The section may (and has in this case) preclude a state from the enforcement of its own laws.

Petitioner thus submits that application of National League of Cities

is appropriate, and that an application of the test there described demonstrates the unconstitutionality of the statute. Clearly the section regulates the States as States, precluding, as it does, admission of illegally recorded evidence, or evidence derived therefrom, by a "State, or a political subdivision thereof...." Second, the federal regulation perhaps even more clearly addresses a matter that is "indisputably an attribute of state sovereignty." It is virtually tautological to state that the decision on the appropriateness of the receipt of particular evidence (assuming no question of the State having obtained it unconstitutionally), that the enforcement of State laws and the conduct of state judicial proceedings, is an attribute of state sovereignty. Finally, it is equally apparent that state

compliance with the federal law would impair the state ability to structure integral operations in areas of traditional functions. The traditional function is state judicial proceedings; the impairment is that the State is prohibited from making its own decision on the admissibility of evidence in proceedings before its courts, being forced instead to bow to the will of Congress. The Tenth Amendment protects the State from this sort of usurpation of authority. As well-put by Professor Tribe, "we surely can avoid insulting the states by ordering them about like so many federal bureaucratic lackeys when the federal constitutional rights of individuals are not at stake....It is one thing for the Constitution to dictate the way of the world to the states and quite another for Congress to do so. The

Commerce Clause, after all, empowers Congress to regulate commerce, not to regulate the states." Tribe, Constitutional Choices, p. 131, (Cambridge, 1985).

Lee v Florida

The District Court relied heavily on Lee v Florida, 392 US 378 (1968), and several other Supreme Court decisions which the district court stated demonstrated that the Court has "several times struck state judicial procedural rules in order to further a federal legislative goal or protect a federal statutory right." District Court opinion, p. 10, fn 6. That court misperceived those cases. As to Lee, Lee did hold that Section 605 of the Federal Communications Act of 1934, the

predecessor of both the current act and Title III, by its terms required exclusion of evidence offered in a state court where that evidence had been obtained in violation of the Act (by the government, in that case). But petitioner here concedes that by its language Section 2515 applies to the States; the question is whether Congress has the constitutional authority to do what it has done. Lee does not settle this question; indeed, it has nothing whatever to say regarding it.

It is clear that the question of Congress's authority and the application of the Tenth Amendment was neither raised nor decided in Lee. The State of Florida did not raise a Tenth Amendment claim, the argument being one of statutory interpretation only. The Court decides

that which is before it and no challenge to the authority of Congress was before it in Lee. No implicit "finding" can be found in Lee, and it is a fundamental principle of interpretation that a point assumed without consideration is not decided. See e.g. Allen v Duffie,, 43 Mich 1 (1880).

Clearly, Congress may choose to make it the policy of the federal government that in the class of illegality here at issue the evidence shall be inadmissible even absent government wrongdoing. But as to the States, that decision belongs to them. Whether their judicial integrity is violated in this situation, though not in other situations of illegal private conduct resulting in the offer of relevant evidence by the state, is not a decision for the Congress. Whether the

privacy of the individual is, in these cases, more important than the ascertainment of the truth, the vindication of public justice, more important than, say, the privacy of the home where that home is invaded by a private individual resulting in the offer of relevant evidence by the State (given that we admit that evidence), is a state decision.

II.

As indicated in the Statement of the Case, the Government agreed with Petitioner in the district court that the instant case presented a case or controversy under Article III. However, Defendant Meese changed his position in the Appellee's Brief, and argued in the brief that there is no case or controversy, a position accepted by the Sixth Circuit.

This is a declaratory judgment action regarding the constitutionality of portions of Title III, the "eavesdropping" chapter, most particularly section 2515 requiring a state court to exclude as evidence in a state cause of action conversations recorded in violation of federal law, and any derivative evidence, even if the State had no hand in the illegality. The Attorney General is the chief law enforcement officer of the United States, and disclosure of conversations recorded in violation of the statute is a federal criminal offense.

In South Carolina v Katzenbach, 383 US 301, 15 L Ed 2d 769, 86 S Ct 803 (1966) Congress had passed the Voting Rights Act of 1965, and South Carolina

filed an original action against the Attorney General of the United States in the United States Supreme Court. In upholding the Act the Court had no difficulty in finding a case or controversy, simply observing that South Carolina sought declaratory and injunctive relief against enforcement of the provisions by the Attorney General, who had enforcement power. 15 L Ed 2d at 774. The Attorney General, as in this case, had done absolutely nothing to South Carolina--he had not threatened prosecution, and he had done nothing to enforce the law, as at that time there had been no violation. But plainly the controversy existed and was real, and Petitioner submits that there is no principled distinction between Katzenbach and the instant case. If the "two prong" test of the Sixth Circuit is the

law--that petitioner show "1)it has suffered actual or threatened injury,... and 2)the injury was the result of an act of the defendant..."--then Katzenbach was wrongly decided, for the injury was no more the result of an act of the defendant in that case than this.

This Court itself has observed that "the difference between an abstract question and a 'case or controversy' for purposes of determining justiciability under Article III of the Federal Constitution is one of degree and is not discernible by any precise test." Babbitt v United Farm Workers, 442 US 289, 60 L Ed 2d 895, 99 S Ct 2301 (1979). Despite this language, however, the Sixth Circuit applied a "precise test" and found Petitioner wanting. But the basic inquiry is whether there is a definite

and concrete dispute which is not hypothetical or abstract, between parties having adverse legal interests. Babbitt, supra. As well put in Babbitt, "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement...."(emphasis added). 60 L Ed 2d at 906. In a Motion to Publish the Court of Appeals' opinion the Attorney General described that court's opinion as holding that "injury resulting from the operation of a federal statute does not give rise to the requisite adversity...." Petitioner agrees with this description of the holding, which is precisely contrary to this Court's statement in Babbit. "As a result of the statute's operation" in this case petitioner has been injured and continues to be injured.

Were Petitioner simply emotionally upset by a perceived intrusion upon state sovereignty caused by the existence of the statute, and wished, as an academic exercise, to establish that the federal Congress had no such power over the states, then there would be no Article III case or controversy. However, as has clearly been established, Petitioner possesses an illegally recorded tape which Petitioner wishes to introduce into evidence at state proceedings, and further wishes to use grand jury subpoenas to gain derivative evidence in investigating the public corruption revealed on the tapes. Section 2515 blocks such efforts, and presently for a state judge to allow otherwise would be to permit a federal criminal offense. This case is not a hypothetical case or an academic exercise. There are real and

significant consequences to the parties (which include Steve Asmer and Metro Institutional Foods, as well as Attorney General Meese) to this Court's decision regarding the tape. Clearly the Attorney General and Petitioner have adverse interests in the matter, just as did the State of South Carolina and Attorney General Katzenbach in South Carolina v Katzenbach. See also Thomas v Union Carbide, US , 105 S Ct 3325,3333 (1985) regarding the sufficiency of a showing that the impact of the challenged federal statute is real and concrete.

It should be observed that there is not only a case or controversy between the State of Michigan and Defendant Attorney General Meese, but between the State of Michigan and defendants Metro Institutional Foods and Steve Asmer, who

gained enforcement of section 2515 in state court, and without question are adverse to Petitioner in an actual controversy involving a question of federal law. An opinion on the merits in this case not only declares the rights between parties State of Michigan and Attorney General Meese as regards the recording and derivative evidence at issue and Title III, but between parties State of Michigan and Metro Institutional Foods and Steve Asmer as well.

The interests, then, of Petitioner and Defendant Attorney General Meese, and between Petitioner and Defendants Metro Institutional Foods and Steve Asmer, being adverse, regarding a concrete controversy and the application of federal law, Petitioner requests that this Court find that a case or

controversy exists, and address the merits of this matter. As indicated above, the holding of the Sixth Circuit conflicts with authority from this Court, and the Attorney General himself stated in the Motion to Publish the Sixth Circuit opinion (which was granted) that the opinion of that court was important, "and in a context where there is little case law." Because the Sixth Circuit has misapplied the law regarding a case or controversy to avoid the merits, certiorari should be granted on both questions.

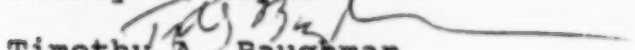
CONCLUSION

WHEREFORE, for the reasons above stated, Petitioner submits that plenary review should be granted, and the Sixth Circuit Court of Appeals and the District Court for the Eastern District of Michigan reversed.

Respectfully submitted,

Frank J. Kelley
Attorney General

John D. O'Hair
Prosecuting Attorney
County of Wayne



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APPENDIX A
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,

Plaintiff,

vs.

Civ. No. 87-CV-70865-DT

EDWIN MEESE, ATTORNEY GENERAL
FOR THE UNITED STATES,

Defendant,

and

STEVE ASMAR and METRO INSTITUTIONAL
FOOR SERVICES, INC.,

Intervening Defendants.

8/10/87

AMENDED OPINION AND ORDER

THIS IS AN ACTION FOR A DECLARATORY JUDGMENT. 28 U.S.C. Sec. 2201 Fed. R. Civ. P. 57. Plaintiff, the State of Michigan, seeks a declaration that Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 ("the Act"), 18

U.S.C. Sec. 2510-2520,[1] violates the Tenth Amendment of the United States

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1 The case focuses on section 2515, which provides in full: Whenever any wire or oral communication has been intercepted, not part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury ... of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2511 provides in pertinent part:

(1) Except as otherwise specifically provided in this chapter any person who -

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communcation;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communcation, knowing or

Constituion[2] as applied to the states. Section 2515 of Title 18 prohibits, inter alia, a state of political subdivision from introducing as evidence in any proceeding the contents, or fruits thereof, of a communication intercepted in violation of section 2511.

> having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both. Pub. L.90-352,Title III, Sec 802, June 19, 1968, 82 Stat. 216. The Electronic Communications Privacy Act of 1986, Pub. L. 99-508 (effective January 20, 1987), comprehensively revised Title III but preserved section 2515 without amendment.

2 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the Sates, are reserved to the States respectively, or to the people."

Plaintiff argues that the only conceivable justification for the Act is the Commerce Clause of the Constitution. Art. 1, Sec 8, cl. 3. Plantiff recognizes that the United States Supreme Court has affirmed the wide scope of the Commerce Clause even as applied to the states, but relies on language in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), that can be construed as having left open the possibility that the Tenth Amendment might impose some "affirmative limits ...on federal action affecting the States under the Commerce Clause." Id. at 556. Plaintiff contends that the Act exceeds such affirmative limits.

The complaint mainly addresses legal questions, not facts. Its statement of the facts of the underlying "controversy" is limited to the following:

> Plaintiff is in receipt of a recording of telephone conversations containing evidence of public corruption. The recording was delivered anonymously, and recorded by a person or persons unknown. 18 USC 2511 and 2515 are preventing investigation of these apparent acts of public corruption.

The "recording" is an audio cassette tape recording that has been the subject of considerable dispute in civil matters on the Court's docket. Jo-Dan, Ltd., Inc. v. Detroit Board of Education, No. 86-CV-72565-DT; A & M Corp. v. Landmark Shoppe, Inc., No. 86-CV-72738-DT; Asmar v. Detroit News, Inc., No. 86-CV-73390.

Plaintiff did not allege that a prosecution is advancing in which a state prosecutor will attempt to introduce as evidence the recording or evidence derived therefore. The complaint did allege that the United States Supreme

Court had previously declined to assert original jurisdiction over the matter.[3]

Concerned that the case was not "ripe" for judicial consideration, the Court issued an Order to Show Cause on March 13, 1987, giving both parties an opportunity to comment on whether a "case or controversy" exists, as required by Art. III, Sec 2, cl. 1 of the Constitution. The Order noted that plaintiff appeared to be seeking "an

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[3] Plaintiff apparently sought to invoke the Supreme Court's original, but not exclusive, jurisdiction over controversies between the United States and a State. See 28 U.S.C. Sec 1251(b)(2). The complaint states that the Supreme Court declined leave to plaintiff to file a bill of complaint in this matter and that the Solicitor General opposed plaintiff's application on the ground that the federal district is a more appropriate original forum. The Supreme Court's one sentence order expressed no opinion as to the appropriate forum in this matter. State of Michigan v. Meese, 107 S. Ct. 1274 (1987).

advisory decree upon a hypothetical state of facts." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 325 (1936), cited in Advisory Committee Notes to Rule 57, supra. The Order also noted that a federal court will not declare on the constitutionality of aspects of an investigation in progress. See Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1100-03 (D.C. Cir. 1985). Finally, the Order stated that it does not appear that "all parties having an interest (in the declaration sought) or adversely affected (have been) made parties or be(en) cited." Advisory Notes, supra.

Plaintiff's response to the Order to Show Cause revealed that the Wayne County Citizens Grand Jury issued subpoenas in an investigation related to matters disclosed on the tape recording of various telephone conversations, including officials of the Detroit

Board of Education, intercepted in probable violation of 18 U.S.C. Sec. 2515. Following a motion in Wayne County Circuit Court to quash the subpoenas based on the Act, a Wayne County circuit judge supervising the grand jury quashed the subpoenas on June 18, 1986, citing the Act as the basis for his decision. Plaintiff filed the state court order quashing the subpoenas and a transcript of the extensive hearing on the motion. Plaintiff argued that the state judge's action created a "case or controversy" because it deprived the State of the only means of investigating the matters discussed in the conversations on the tape.

Defendant filed a response to the Order to Show Cause on April 13, 1987. Defendant, who is joined in the case because he is "charged with the responsibility of enforcing the laws

of the United States,"[4] agreed with plaintiff that the matter is ripe for judicial consideration. Defendant asserted that purely legal questions are involved and unlikely to be clarified by further factual development. See Thomas v. Union Carbide Agricultural Productions Co., 473 U.S. 568, 581 (1985); Babbitt v. United Farm Workers National Union, 442 U.S. 289, 300-01 (1979).

For the reasons stated on the record of the hearing on May 4, 1987, the Order to Show Cause was dismissed by Order of May 5. On May 22, the intervening defendants - one of whom admits involvement in the intercepted conversations - moved to intervene either as of right, Fed. R. Civ. p. 24(a)(2), or by permission, Fed. R. Civ. P.24(b)(2). The motion was granted on June 2.

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[4] The Attorney General is a proper party to any action affecting the interests of the United States. See 28 U.S.C. Sections 516, 517, 2403(a); see also Fed. R. Civ. P. 24(c).

Now before the Court are cross-motions for summary judgment. Fed. R. Civ. P. 56. There are no disputes over facts, as the case presents a purely legal question. The parties have ably briefed the issue, and the Court has conducted its own analysis beyond the scope of the briefs.

For the reasons that follow, defendant's motion is GRANTED and the case DISMISSED.

II.

A.

This case clearly poses a question about the limits of the principle of federalism and its embodiment in the Bill of Rights, the Tenth Amendment. Much has been said of late about federalism and the role of the judiciary. Compare, e.g. The Status of Federalism in America

(Report of the Working Group on Federalism of the Domestic Policy Council, Nov., 1986) (bemoaning the failure of the Supreme Court to overrule more Congressional statutes), and Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985) (criticizing Garcia, supra), with J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980) (proposing that the Supreme Court rule such federalism issues to be nonjusticiable questions that must be left to the political branches).

At least two state courts have noted that section 2515 involves questions of federalism when applied to state court proceedings that are traditionally of state concern. Compare In re Marriage of Lopp, 378 N.E.2d 414, 421 (Ind. 1978)

refusing to apply section 2515 under circumstances of case), cert. denied, 439 U.S. 1116 (1979), with Halpin v. Superior Court of San Bernardino County, 495 P.2d 1295, 1305(Cal.)(rejecting Tenth Amendment challenge to section 2515), cert. denied, 409 U.S. 982 (1972). One constitutional scholar has noted that, in general, the "(e)xpansion of federal criminal jurisdiction raises some of the most sensitive problems of potential congressional impingement upon the values of federalism." G. Gunther, Constitutional Law Cases and Materials 194 (9th ed. 1978).

B.

However divergent may be the political, academic, and state court views regarding federalism, the Court is bound to look for guidance in the decisions of the Supreme Court of the United States. The issue is not decided

in a legal vacuum. The Supreme Court has considered the scope of the Tenth Amendment, even though its teachings on that subject may be in a state of flux. Briefly, however, this much can be said: there is not a single case that can be considered "good law" that purports to overrule a federal statute on the ground that it violates the Tenth Amendment.

In Usery v. National League of Cities, 426 U.S. 833 (1976), the Supreme Court struck down a federal minimum wage statute for state employees as violative of the Tenth Amendment. After Usery, however, the Supreme Court declined to invalidate a single federal law applicable to the state on the ground that it interferes with their autonomy under the Tenth Amendment. Now, even Usery is no longer the law. With the Supreme Court's decision in Garcia, supra, which overruled Usery, the Tenth

Amendment has become a dead letter in constitutional law.

Subsequant to Garcia, it is not clear what standard applies to issues like the one before the Court. Garcia seems to have discarded Usery's "balancing" test. See 469 U.S. at 564n.7 (Powell, J., dissenting). But see id. at 579-80 (Rehnquist, J., dissenting) (disagreeing that Usery announced a "balancing" test). However, Garcia fails to "identify or define what affirmative limits the consitutional structure might impose on federal action affecting the States under the Commerce Clause." Id. at 556. Indeed, the State of Michigan admits that "it is difficult to conceive a method of analysis for the question here at issue." While the State has attempted to fill this void with some imaginative legal and political analysis, it does not lead to the declaration it seeks.

C.

The Supreme Court is unlikely to accept the State's argument here, since the Supreme Court has applied the exclusionary rule - a judicial supervisory rule not required by the Constitution, see United States v. Leon, 468 U.S. 897, 905-06 (1984) - to the States, with the same result as here of suppressing evidence the State seeks to introduce in a prosecution. Under the exclusionary rule, states are bound to exclude evidence in some cases even where governmental agents obtained the evidence in subjective good faith (as, for example, where an officer's seizure of the evidence under a facially deficient warrant is not objectively reasonable). Leon, 468 U.S. at 922-23. The Supreme Court has already noted that, as the exclusionary rule was understood at the time, section 2515 proscribes such

evidence not only to deter misconduct by governmental agents but also to preserve the integrity of court proceedings, i.e. "to ensure that the courts do not become partners to illegal conduct." Gelbard v. U.S., 408 U.S. 41, 49-51 & n.8 (1972) (quoting the Congressional findings that precede Title III, Section 801 (b), 82 Stat. 211). Thus, the State's argument here that its agents did nothing reprehensible in obtaining the recording at issue is not relevant.

Another persuasive example against the State's position is the Supreme Court's requirement that state courts exclude confessions obtained in violation of the familiar Miranda warning (or an adequate state equivalent). Here, the Supreme Court has imposed on state criminal proceedings a judicially-designed rule of evidence not required by the Constitution. See Michigan v. Tucker,

417 U.S. 433, 444 (1974). The result is to exclude in some cases evidence voluntarily given and constitutionally obtained. See Michigan v. Mosely, 423 U.S. 96, 100 (1975); Tucker, supra, 417 U.S. at 443.

By enacting section 2515, Congress requires exclusion of illegally otained electronic recordings, which is a form of obtaining an incriminating statement without informed consent or proper safeguards against intrusion of privacy. The State does not say why, if it is legitimate for the Supreme Court to promote the integrity of the courts through rules of criminal procedure, Congress may not do the same. In Olmstead v. United States, 277 U.S. 438 (1927), the Supreme Court endorsed the power of Congress to make intercepted telephone conversations inadmissible whereas the court might lack such power under the Fourth Amendment (as understood

at that time). Id. at 465-66. Indeed, the legislative history of section 2515 indicates that Congress largely intended to reflect existing search and seizure law. See S. Rep. No. 1097, 90th Cong., 2d Sess. 66, 96, reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2185.

The State concedes that Congress may forbid private persons from intercepting conversations without authorization, but simply argues that the State may subsequently use evidence privately intercepted even if its own agents could not have legally made the initial seizure. While the Supreme Court has accepted this argument where Congress has not spoken, see United States v. Jacobsen, 466 U.S. 109 (1984), the Supreme Court has disallowed state use of such evidence where Congress has spoken, as in section 605 of the Communictions Act of 1934, the predecessor of section

2515. See Lee v. Florida, 392 U.S. 378 (1968).[5] The State correctly points out that the Supreme Court in Lee did not address the Tenth Amendment issue. Nonetheless, the Supreme Court's subsequent pronouncements on the Tenth Amendment and continued application of the exclusionary rule to state courts suggest it would not overrule Lee or the statutory basis for that decision.

In enacting section 2515, Congress noted: "Only by striking at all aspects of the problem can privacy be adequately protect." S. Rep. No. 1097, supra, at

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[5] The Court in Lee stated: "We conclude ... that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law" in the only effectively available way - by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960)." 392 U.S. at 386-87. The Court of Appeals for the First Circuit recently reached the same conclusion under the current section 2515. United States v. Vest, 813 F.2d 477 (1st Cir. 1987).

69 (quoted in Gelbard, supra, 408 at 50), reprinted in 1968 U.S. Code Cong. & Admin. News 2156. In making this statement, Congress indicated that it considers judicial exclusion of improperly obtained communications "necessary and proper" to execute its other intentions in Title III. See . Rep. No. 1097, supra, at 96, reprinted in 1968 U.S. Code Cong. & Admin. News 2185 (asserting power found at Art. 11, Sec. 8, cl. 18). As noted above, these other intentions include judicial integrity, which, as also noted earlier, was dispositive in the Supreme Court's decision in Lee to uphold the predecessor statute to section 2515. In short, Congress agrees with the Supreme Court that a bright-line rule of exclusion is best suited to protect the federal interests at stake. Such bright-line rules are always best addressed in the

political arena rather than in the courts, since they evolve against the background of law developed on an ad hoc basis by the courts. See Professor Herbert Wechsler's seminal work on this subject, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 545 (1954).

Where, as here, the State concedes Congress's power (absent consideration of the Tenth Amendment) to enact such a law, the Tenth Amendment does not impose an independent limitation on Congress that permits a court to reject Congress's view that a narrow aspect of a statute is "necessary" to effectively implement its larger purposes.[6] As stated by Justice

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[6]Professor Van Alstyne has noted the Supreme Court's general refusal to substitute its view of what is "necessary" for that of Congress when federalism

concerns are involved. "Usually, ... even in close cases when the federalism claim has failed (as most often it has indeed failed), it has failed because the Court has yielded to an assertion of some overriding federal interest it deemed adequate to rationalize the exceptional intrusiveness of the challenged act." The Second Death of Federalism, supra, 83 Mich. L. Rev. at 1722 & n.61.

See Fry v. United States, 421 U.S. 542 U.S. 542, 548 (1975) (upholding application of federal wage restraints as a national emergency measure): Testa v Katt, 330 U.S. 386 (1947) (upholding binding nature of penal provisions of Emergency Price Control Act on state courts under supremacy clause); Case v Bowles, 327 U.S. 92 (1946) (upholding) application of the Emergency Price Control Act against Tenth Amendment challenge).

While not explicitly considering the Tenth Amendment issue, the Court has several times struck state judicial procedural rules in order to further a federal legislative goal or protect a federal statutory right. See International Longshoreman's Ass'n, AFL-CIO v Davis, 106 S. Ct. 1904 (1986)(striking state pleading rule to protect preemption of National Labor Relations Act); Dice v Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) (striking state procedural rule to protect right of recovery under Federal Employers' Liability Act); Brown v Wesern Ry. of Alabama, 338 U.S. 294 (1949) (same); see also Chapman v California, 386 U.S. 18 (1967) (imposing federal interpretation of "harmless error rule" over that of state).

Story: "It is plain, therefore, that it could not have been the intention of the framers of this (Tenth) amendment to give it effect, as an abridgement of any of the powers granted under the constitution, whether they are express or implied, direct or incidental." 3 Commentaries on the Constitution Sec. 11901 (1833), in V The Founders' Constitution 406 (P. Kurland & R. Lerner ed. 1987).

There is nothing peculiar about Congress's intrusion under the Commerce Clause into state criminal proceedings that compels a different conclusion. Admittedly, there is little discussion by the Founding Fathers of the meaning of the Tenth Amendment as it relates to criminal laws and their administration. This is to be expected, since it was presumed that all powers in such matters

not given to the United States would continue, unenumerated, within the states as before. However, there is a pertinent reference by President James Monroe on this subject: "(T)he administration of justice, and the whole criminal code, except in cases of breaches of the laws of the United States made under and in conformity with the powers vested in Congress ... are regulated by State laws." The Founders' Constitution, supra, at 405 reprinting in part Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822) (emphasis added). This statement evidences that one of the few Founding Fathers[7] who may have said anything on

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[7]While some may disagree with the characterization of Monroe as a "founding Father," he participated substantially in the formation of the Republic, including the debates about the principle of federalism, and was familiar with the thinking of the greater men who over-

the subject did not consider the Tenth Amendment to establish any special limitation on Congress simply because it may choose to exercise its vested power in the criminal arena.

Currently, constitutional doctrine regarding the Tenth Amendment has reverted to its pre-Usery state, to wit, the Tenth Amendment is no more than a truism; it tautologically states that powers not given to the federal government are reserved to the states. The Court recognizes the avowed intent of Chief Justice Rehnquist in his Garcia dissent to resurrect Usery, 469 U.S. at 580. Perhaps a majority of the Supreme

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shadowed him during that era. Monroe studied law under Thomas Jefferson beginning in 1780. From 1783 to 1786 he served in the Congress under the Articles of Confederation. He was chosen a member of the Virginia House of Delegates in 1787 and, in 1788, a member of the state convention at which Virginia ratified the new federal Constitution.

Court will do so as its composition changes and shifts in its politics and philosophy of constitutional adjudication.

As noted by Professor Herbert Wechsler, "Federalism would have few adherents were it not, like other elements of government, a means and not an end." The Political Safeguards of Federalism, supra, at 552. A return to Usery would likely be considered to "politicize" the Constitution, which the defenddant has cautioned against elsewhere.[8] The long-standing view, however, has been that the Tenth Amendment will not support political goals:

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[8]See Remarks of the Attorney General at the American Studies Center Bicentennial Program in Washington, D.C. (June 12, 1987). The printed version of the Attorney General's address states, at 2: "Too often the Constitution has been, in a word, politicized. The modern-day politicization of our supreme law has been encouraged primarily by political and

> The attempts, then, which have been made from time to time, to force upon this language (the Tenth Amendment) an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words, or the sense of the instrument. Stripped of the ingenious disguises, in which they are clothed, they are neither more nor less, than attempts to foist into

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judicial liberals..." Commentators have noted, however, that Usery was a conservative political doctrine. A leading treatise on constitutional law describes the rise of Usery as follows: "There is little or no explanation for the shift in the Court's position regarding the judically enforceable nature of the tenth amendment other than the politcal background and philosophy of the newly appointed justices. The decisions of the 1970's, attacking the established principle of judicial deference to congressional decisions regarding federalism issues were joined only by Republican justices. Those justices were Blackmun, Powell, Rehnquist, Stewart (who was replaced by the even more states' rights oriented Justice O'Connor) and Chief Justice Burger." J. Nowak, R. Rotunda & J. Young, Constitutional Law 162 n.33 (3d ed. 1986). Ultimately, the doctrinal "glue" holding together the Usery approach proved so weak that it could not hold even a majority of a conservative Court, as reflected in the change of mind by Justice Blackmun, who concurred in Usery but wrote the opinion of the Court in Garcia only nine years later.

> the text the word "expressly;" to qualify, what is general, and obscure, what is clear, and defined. They make the sense of the passage bend to the wishes and prejudices of the interpreter; and employ criticism to support a theory, and not to guide it. ... (Constitutions) are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders.

Story, Commentaries, supra, Section 1901, in V The Founders' Constitution, supra, at 407.

III.

Even if the Garcia dictum on which the State relies makes the Tenth Amendment fertile soil for planting the seeds of a states' rights movement, it would ill behoove a federal district judge to say so by declaring unconstitutional an act of Congress in so important an area as here. Much has been said of late regarding the evils of activist judges who strain to overrule legislation enacted by the elected representatives of the people. If those elected to serve in

Washington should desire to constrain the actions of their governments back home, far be it from this Court to tell them that they cannot do so. See Garcia, 469 U.S. at 556. See generally The Political Safeguards of Federalism, supra.

If the Constitution forbids the Act, it is for someone else to say.

SO ORDERED.

_____

AVERN COHN

United States District Judge

Dated: August 10, 1987

Detroit, Michigan

A TRUE COPY

BY_____

DEPUTY CLERK

APPENDIX B

JULY 6, 1988

NO. 87-1719

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EDWIN MEESE, Attorney General for the United States,

Defendant-Appellee,

and

STEVE ASMAR & METRO INSTITUTIONAL FOOD SERVICES, INC.,

Intervening Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

BEFORE: JONES and RYAN, Circuit Judges; and Gibson, District Judge.*

PER CURIAM. The State of Michigan, brought this declaratory judgment action

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*The Honorable Benjamin F. Gibson, United States District Judge for the Western District of Michigan, sitting by designation.

asking the district court to find that 18 U.S.C. Sec. 2515, which excludes from evidence in all state criminal and civil trials, conversations which were recorded in violation of the federal wiretapping statutes, is beyond the scope of Congress' Commerce Clause power and therefore violative of the tenth amendment. The district court dismissed plaintiff's action. We affirm.

A Wayne County, Michigan grand jury issued subpoenas based on privately tape recorded telephone conversations anonymously given to state prosecutors. A Michigan state court quashed the subpoenas, holding that the evidence was obtained in violation of Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968, 18 U.S.C. Sec. 2515. The state court's action ended the grand jury investigation.

On March 10, 1987, the State of Michigan filed suit in federal district court against the Attorney General of the United States, seeking a declaratory judgment that 18 U.S.C. Sec. 2515 was violative of the tenth amendment. Section 2515 states:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. Section 2515.

The State of Michigan argued that Section 2515 required the suppression of evidence where the state was not a party because of Section 2511 which states in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when-

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

...

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

> shall be punished as provided in subsection(4) or shall be subject to suit as proovided in subsection(5).

18 U.S.C. Section 2511. Plaintiff argued that requiring suppression of the evidence was beyond the Congress' Commerce Clause power, under which the Crime Control Act was passed.

The district court issued a show cause order as to ripeness. The parties agreed there was a case or controversy within article III of the Constitution. Thereafter, on cross-motions for summary judgment, the district court found that the exclusionary rule found in 18 U.S.C. Section 2515 was constitutional as an exercise of Congress' Commerce Clause power.

Although both parties agreed below that this case was ripe for adjudication, the United States Attorney General now argues that there is no "case or controversy" pursuant to article III of

the Constitution and, therefore, this court lacks subject matter jurisdiction. The judicial power of the federal government is limited to that provided for by article III.

> Article III of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies." Liverpool S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). The requirements of Art III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination or real, earnest and vital controversy." Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892).

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982). If there is no case or controversy, this court lacks subject matter jurisdiction to hear this appeal even though the parties agreed below that the case was right for adjudication; agreement of the parties cannot establish subject matter jurisdiction. In re Rini, 782 F.2d 603, 609 n.10 (6th Cir. 1986).

The Supreme Court, discussing the limits of article III power, has stated:

> (A)t an irreducible minimum, Art III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976).

Valley Forge Christian College, 454 U.S. at 472. Thus, the plaintiff, in the instant case, must show that (1) it has suffered actual or threatened injury, which it clearly has through the quashing of the subpoenas, and (2) the injury was the result of an act of the defendant. "The court may not act to redress injury 'that results from the independent action of some third party not before the court.'" Toth v. United Auto. Aero. & Agr. Implement Workers, 743 F.2d 398, 404 (6th Cir. 1984) (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42 (1976)). It is the second element which the plaintiff fails to satisfy.

Plaintiff's injury did not result from any action taken by the defendant, the Attorney General of the United States. Rather, it was the state trial court

judge who quashed the subpoenas and enforced the federal statute, 18 U.S.C. Section 2515. The Attorney General has not threatened plaintiff with any penalty for attempting to use the taped conversations which are the subject of this litigation. Plaintiff's remedy is to appeal the state court's decision through the state court system.

Because defendant herein has not caused the injury suffered by the plaintiff, this court is without subject matter jurisdiction to hear this appeal. Although the district court dismissed the instant action on the merits, this court may affirm the district court for reasons other than those stated by the lower court. Russ' Kwik Car Wash v. Marathon Petroleum Co., 772 F.2d 214, 216 (6th Cir. 1985).

For the reasons stated above the decision of the district court is AFFIRMED.

Supreme Court, U.S.
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No. 88-402

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF MICHIGAN, PETITIONER

v.

RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a State may challenge the constitutionality of 18 U.S.C. 2515, which prohibits the introduction into evidence in federal and state proceedings of wire, oral, and electronic communications intercepted in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, by filing a declaratory judgment action against the Attorney General of the United States.

2. Whether 18 U.S.C. 2515 violates the Tenth Amendment to the Constitution.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 30a-38a) is reported at 853 F.2d 395. The opinion of the district court (Pet. App. 1a-29a) is reported at 666 F. Supp. 974.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1988. The petition for a writ of certiorari was filed on August 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Com-

munications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, 18 U.S.C. (& Supp. IV) 2510-2520, comprehensively regulates the nonconsensual interception of wire, oral, and electronic communications. Section 2518 establishes the procedures through which law enforcement officials may obtain orders authorizing wiretaps. Section 2511(1) makes it a criminal offense, inter alia, to intercept a wire communication without such an order or to disclose or use the contents of a communication that has been intercepted in violation of the Act. Finally, Section 2515 (see Pet. 8) requires the exclusion of "the contents of" an intercepted communication and "evidence derived therefrom" in all state and federal proceedings "if the disclosure of that information would be in violation of" the Act.

2. Petitioner, the State of Michigan, claims to be in possession "of a recording of telephone conversations containing evidence of public corruption" that was "delivered anonymously, and recorded by a person or persons unknown" (Pet. App. 5a). In 1986, a circuit judge in Wayne County, Michigan, quashed subpoenas based on that recording, citing Section 2515 as the basis for his decision (Pet. App. 7a-8a). No appeal was taken from that order. Instead, petitioner sought leave to file an original bill of complaint in this Court attacking the constitutionality of Section 2515. This Court denied that application in February 1987. *Michigan* v. *Meese*, 479 U.S. 1078 (1987).

3. Petitioner then filed this action against the Attorney General in the United States District Court for the Eastern District of Michigan. The complaint sought a declaratory judgment "that 18 [U.S.C.] 2515 is unconstitutional when applied to State proceedings as violative of the Tenth Amendment" (Complaint para. 4). It alleged that the State's claim involved "an actual controversy," since 18 U.S.C. 2515 was "preventing investigation of * * * apparent acts of public corruption" that were reflected in the

recording state authorities had obtained (Complaint para. 10). However, the complaint did not allege that the Attorney General had taken or threatened to take any action to enforce Title III against petitioner or to interfere with the state grand jury's investigation. Thereafter, two individuals, one of whom admitted having participated in the intercepted conversations, were granted leave to intervene as defendants (Pet. App. 9a).

4. The district court granted summary judgment in favor of the Attorney General on the merits of petitioner's claim and dismissed the complaint (Pet. App. 1a-29a).[1] The court observed that this Court was "unlikely to accept the State's [Tenth Amendment] argument," since the Court itself has adopted exclusionary rules, in the context of the Fourth Amendment and the *Miranda* decision, which are binding on state courts even though not constitutionally required (*id.* at 15a-17a). Reviewing the legislative history of Section 2515, the court found that Congress had enacted that provision because it considered "judicial exclusion of improperly obtained communications 'necessary and proper' to execute its other intentions in Title III" (Pet. App. 20a). The district held (*id.* at 21a):

> Where, as here, the State concedes Congress's power (absent consideration of the Tenth Amendment) to enact such a law, the Tenth Amendment does not impose an independent limitation on Congress that permits a court to reject Congress's view that a narrow aspect of a statute is "necessary" to effectively implement its larger purpose.

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[1] The district court had earlier raised the question whether the suit was ripe by issuing an order to show cause *sua sponte*. Both petitioner and the Attorney General expressed the position at that point that the suit was ripe. Pet. App. 6a-9a.

5. The court of appeals affirmed on a different ground, holding that it lacked jurisdiction under Article III (Pet. App. 30a-38a). The court noted that petitioner failed to show that its alleged injury had resulted from any action by the Attorney General, and concluded that the State lacked standing to sue (*id.* at 37a):

> Plaintiff's injury did not result from any action taken by the defendant, the Attorney General of the United States. Rather, it was the state trial court judge who quashed the subpoenas and enforced the federal statute, 18 U.S.C. 2515. The Attorney General has not threatened plaintiff with any penalty for attempting to use the taped conversations which are the subject of this litigation. Plaintiff's remedy is to appeal the state court's decision through the state court system.

ARGUMENT

1. The court of appeals properly refused to reach the merits of petitioner's claim. Petitioner does not and cannot allege that the Attorney General or any of his subordinates has taken any action to enforce Section 2515 against petitioner or to hinder the progress of the state grand jury investigation. Since federal officials are not responsible for any actual or threatened injury to petitioner, petitioner's lawsuit does not present a case or controversy within the meaning of Article III. *Valley Forge Christian College* v. *Americans United for Separation of Church & State,* 454 U.S. 464, 471-472 (1982); *Warth* v. *Seldin,* 422 U.S. 490, 498, 505 (1975); *Linda R. S.* v. *Richard D.,* 410 U.S. 614 (1973). Rather, as the court of appeals noted (Pet. App. 37a), if petitioner was dissatisfied with the state court's decision quashing the grand jury's subpoenas, the proper remedy was to pursue an appeal through the state court system.

Petitioner's reliance (Pet. 53-56) on *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and *Babbitt* v. *United Farm Wrkrs. Nat'l Union*, 442 U.S. 289 (1979), is misplaced. In *Katzenbach*, this Court heard a challenge to various provisions of the Voting Rights Act of 1965. However, by contrast to Section 2515, the Voting Rights Act assigned the Attorney General specific functions in the implementation of the provisions of the Act that were in dispute in *Katzenbach*. Significantly, this Court noted that South Carolina's attack on the criminal provisions of the Act was "premature," since no one had "been subjected to, or even threatened with, the criminal sanctions which these sections of the Act authorize" (383 U.S. at 317). *Katzenbach* thus recognized that South Carolina could not obtain a determination of the constitutionality of provisions that the Attorney General was not implementing or threatening to enforce. Similarly, in *Babbitt*, this Court entertained a suit challenging certain provisions of Arizona's farm labor statute. However, the named parties included the state authorities responsible for implementing or enforcing those provisions (449 F. Supp. 449, 450 (D. Ariz. 1978)). As in *Katzenbach*, this Court limited its review of the validity of the statute to those specific provisions that state authorities were applying to or threatening to enforce against the plaintiffs (442 U.S. at 297-305). Neither of these cases suggests that a party may adjudicate the constitutionality of a federal statute by seeking a declaratory judgment against the Attorney General when he is not implementing, enforcing, or threatening to enforce the statute.

Contrary to petitioner's suggestion (Pet. 57-58), the fact that two individuals have intervened as defendants does not make petitioner's claims justiciable. The only injury to petitioner alleged in the complaint is the State's difficulty

in proceeding with a grand jury investigation without the use of a recording obtained in alleged violation of Title III of the Act. The complaint does not allege that the intervenors have any practical or legal ability to affect the progress of the investigation that petitioner wishes to pursue. If that investigation has been halted, as petitioner alleges, the cause was the state court's decision to quash the grand jury's subpoenas in reliance on Section 2515, not anything the two individuals have done. Significantly, on the present record this case does not call for review of a specific attempt by these individuals to exclude evidence in any proceeding to which the State is a party.[2]

2. Apart from Article III, the absence of a concrete factual setting for petitioner's challenge to Section 2515 makes this case unsuitable for review by this Court. Petitioner's complaint asserts that Section 2515 is unconstitutional on its face. The record contains no information about the circumstances under which the particular recording that allegedly has occasioned this suit was made or how it was obtained. The case does not arise out of a specific attempt to introduce evidence over a litigant's objection. This Court's cases make clear that the constitutionality of an important federal statute should not be determined in such an abstract setting. *E.g., Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 569 (1947). As the Court stated in

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[2] As the district court observed (Pet. App. 6a & n.3), we opposed the filing of petitioner's original bill of complaint in *Michigan* v. *Meese, supra,* on the ground that the district court was an available and more appropriate forum. However, the argument regarding the relative merits of proceeding in this Court and in the district court obviously expressed no opinion on the applicability of Article III, which would bar a lawsuit of the sort petitioner has brought.

Socialist Labor Party v. *Gilligan*, 406 U.S. 583, 588 (1972) (footnote omitted):

> This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case "tenders the underlying constitutional issues in clean-cut and concrete form." *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584 (1947). Problems of prematurity and abstractness may well present "insuperable obstacles" to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. *Id.* at 574.

These principles counsel against review of petitioner's broad request for a declaratory judgment that Section 2515 is unconstitutional.

3. In any event, petitioner's arguments on the merits (Pet. 16-51) raise no substantial issue regarding the constitutionality of Section 2515. Congress's authority to prescribe a rule of decision that prohibits the use of the fruits of a federal crime as evidence in state proceedings is not inconsistent with any view of the Tenth Amendment that has been advanced in this Court's cases or with principles of federalism.

There is no dispute that enacting Section 2515 was within Congress's power under the Commerce Clause (see Pet. App. 23a-24a). The Act included Congress's findings that "[w]ire communications are normally conducted through the use of facilities which form part of an interstate network," that "[t]here has been extensive wiretapping carried on without legal sanctions," and that "[t]he contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings" (Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351,

Tit. III, § 801(a), 82 Stat. 211). Congress further found (§ 801(b), 82 Stat. 211):

> In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary * * * to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, [and] to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

See also S. Rep. 1097, 90th Cong., 2d Sess. 69, 90-91 (1968). In Congress's view, Section 2515's suppression remedy was "necessary and proper to protect privacy" and formed "an integral part of the system of limitations designed to protect privacy" (S. Rep. 1097, *supra,* at 96).[3]

Section 2515 was patterned after the exclusionary rule that this Court extended to state proceedings in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), and applied to electronic surveillance in *Berger* v. *New York,* 388 U.S. 41 (1967), and *Katz* v. *United States,* 389 U.S. 347 (1967). See S. Rep. 1097, *supra,* at 96. The Act's authors "used the *Berger* and *Katz* decisions as a guide in drafting Title III" (S. Rep. 1097, *supra,* at 75), and believed that Section 2515 "largely reflect[ed] existing law" (S. Rep. 1097, *supra,* at 96; see *id.* at 67-68, 74-75, 96 (reviewing this

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[3] Contrary to petitioner's suggestion (Pet. 35-36), these concerns are not inapplicable when government officials are not involved in wiretapping. Congress could rationally find that the prospect that illegal wiretap evidence might be admissible in court proceedings would provide an incentive for private parties to engage in wiretapping, and that it was necessary to eliminate that incentive.

Court's decisions)). Although Section 2515 went farther than this Court's decisions in some respects, for instance by forbidding the use as evidence of illegal recordings that were created by private parties, Congress nevertheless made use of the same type of exclusionary rule that this Court had already adopted for state proceedings.

This Court has previously acknowledged that Congress has the power to require state courts to exclude unlawfully intercepted communications from their proceedings. In *Lee* v. *Florida,* 392 U.S. 378 (1968), the Court construed the predecessor of Title III, Section 605 of the Federal Communications Act of 1934, ch. 652, 48 Stat. 1103-1104, as prohibiting the admission in state proceedings of evidence derived from illegal wiretapping. The Court found support for its construction of the statute in *Mapp* v. *Ohio, supra,* recognizing that there was an analogy between Congress's and the Court's actions in this area (392 U.S. at 385). Even Justice Harlan's dissent, which disagreed with the majority's decision as a matter of statutory construction, agreed that "Congress has ample power to proscribe any particular use of intercepted telephone conversations" (*id.* at 388 (Harlan, J., dissenting)).[4]

No point of view expressed in any of this Court's decisions under the Tenth Amendment casts any doubt on Congress's power to enact an "evidentiary sanction" to discourage illegal wiretapping. In *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 552, 556 (1985), and *South Carolina* v. *Baker,* No. 94 Orig.,

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[4] *Lee* overruled *Schwartz* v. *Texas,* 344 U.S. 199 (1952), on the statutory question. Even in *Schwartz,* the Court expressed no doubt concerning Congress's power to require the exclusion, in state proceedings, of evidence derived from illegal wiretaps, but held that Congress had not clearly expressed an intention to do so.

(Apr. 20, 1988), Slip op. 5-7, this Court held that the Tenth Amendment establishes structural, not substantive, limits on Congress's authority to regulate interstate commerce, *i.e.*, that States must find their protection from congressional regulation in the political process, not through judicially defined spheres of unregulable state activity. Here, Michigan cannot contend that it was "deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless" when Section 2515 was enacted. *South Carolina* v. *Baker,* slip op. 6. Under the analysis of *Garcia* and *Baker,* therefore, Michigan has no Tenth Amendment claim.

Moreover, contrary to petitioner's contentions, Section 2515 passes muster even under the criteria set out in *National League of Cities* v. *Usery,* 426 U.S. 833, 845, 852, 854 (1976). A statute which prohibits the use of the fruits of a federal crime as evidence in state proceedings does not regulate "the States as States," impair "attributes of [state] sovereignty attaching to every state government," or "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" (*ibid.*). Section 2515 does not impair the functioning of any state court or other agency as such; it provides a rule of decision indistinguishable from other federal law that state tribunals are required by the Supremacy Clause to apply.[5] In any event, Congress's findings regarding the

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[5] Dicta in *In re Marriage of Lopp,* 268 Ind. 690, 378 N.E.2d 414, 423 (1978), cert. denied, 439 U.S. 1116 (1979), do not support petitioner's position. In *Lopp,* the trial court had received an illegal recording solely for the purpose of passing on a wife's claim that she had been coerced by that recording into signing a separation agreement with her husband. The Indiana Supreme Court held that, as a matter of statutory construction, Section 2515 did not forbid receiving the recording for that purpose. Its decision was carefully limited, and its

prevalence of unlawful electronic surveillance and the need to remove incentives to engage in such practices provide "a federal interest" justifying "state submission." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 288 n.29 (1981). The undoubted constitutionality of Section 2515 under any of the tests this Court has recognized makes it unnecessary to consider what "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause" (*Garcia,* 469 U.S. at 556).[6]

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passing reference to the Tenth Amendment predated this Court's decision in *Garcia.*

[6] It should also be noted that Congress believed that Title III was authorized, at least in part, by Section 5 of the Fourteenth Amendment. S. Rep. 1097, *supra,* at 92 (citing *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966)). That provision gives Congress the power to enforce the Fourteenth Amendment by appropriate legislation. In *National League of Cities,* this Court reserved the question whether the analysis in that case would apply to legislation authorized by Section 5. 426 U.S. at 852 n.17. Cf. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 456 (1976) ("[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, * * * are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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OCTOBER TERM, 1988

THE STATE OF MICHIGAN, Petitioner

v.

EDWIN MEESE, Attorney General
for the United States, Respondent

and

STEVE ASMAR and METRO INSTITUTIONAL
FOOD SERVICES, INC.
Intervening Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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STATEMENT OF QUESTIONS PRESENTED

I.

IS TITLE 18, U.S.C. § 2515 INAPPLICABLE TO THE STATES PURSUANT TO THE TENTH AMENDMENT, OR, IN THE ALTERNATIVE, DOES CONGRESS HAVE THE AUTHORITY TO BIND STATES UNDER THE "WIRETAP LAW" PURSUANT TO THE COMMERCE CLAUSE?

II.

IS SECTION 2515 OF TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 BINDING UPON THE STATES PURSUANT TO AMENDMENTS OTHER THAN THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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No. 88-402

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1988

THE STATE OF MICHIGAN, Petitioner

v.

EDWIN MEESE, Attorney General
for the United States, Respondent

and

STEVE ASMAR and METRO INSTITUTIONAL
FOOD SERVICES, INC., Intervening Respondents.

BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE SIXTH
CIRCUIT COURT OF APPEALS

The Intervening Respondents, STEVE ASMAR and METRO INSTITUTIONAL FOOD SERVICES, INC. respectfully request that this Court deny Petitioner's Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Opinion of the District Court for the Eastern District of Michigan is attached hereto as Appendix A. The opinion of the Sixth Circuit Court of Appeals is appended as Appendix B.

JURISDICTION

The judgment of the District Court for the Eastern District of Michigan was entered on August 10, 1987. The judgment of the Sixth Circuit Court of Appeals was entered on July 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

"The Congress shall have Power

* * *

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

2. The Fourth Amendment to the United States Constitution provides in relevant part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The Fifth Amendment to the United States Constitution provides in relevant part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

4. The Tenth Amendment to the United States Constitution provides in relevant part:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. The Fourteenth Amendment to the United States Constitution provides in relevant part:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

6. Title 18, U.S.C. § 2510 provides in relevant part:

"As used in this chapter [18 USCS §§ 2510 et seq.]--

* * *

(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such

communication is not subject to interception under circumstances justifying such expectation;

(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than --

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) 'person' means any employee, or agent of the United states or any State or political subdivision thereof, and any

individual, partnership, association, joint stock company, trust, or corporation;

* * *

(8) 'contents,' when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) 'Judge of competent jurisdiction' means --

(a) a judge of the a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

* * *

(11) 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

7. Title 18, U.S.C. § 2515 provides in relevant part:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any

court, grand jury, department, officer agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter [18 USCS §§ 2510 et seq.]."

STATEMENT OF THE CASE

The State of Michigan is contesting the constitutionality of the Omnibus Crime Control and Safe Streets Act of 1968 based upon the Tenth Amendment. If the State of Michigan is correct then, of course, the purpose for Title 18 U.S.C. § 2510 et seq. would be thwarted and Congress' power to control commerce would be thwarted and be meaningless. Furthermore, the State ignores the constitutionality of Title 18, U.S.C. § 2510 et seq. as applicable to the states under the First, Fourth and Fifth Amendments of the United States Constitution as made applicable to them by the Fourteenth Amendment.

What transpired in this particular is that there was an illegal wiretapping made of conversations involving three individuals, none of whom had given authorization nor had known about such electronic recording of their conversations on a tape. The perpetrator of the

improper act then mailed the tape to an attorney. The attorney then proceeded to make use of this tape and disseminate the contents of the tape in an unauthorized manner including giving a copy to the Wayne County Prosecutor's office.

An attempt was made to have a grand jury investigation based upon the tape. The grand jury judge quashed the tape pursuant to Title 18, U.S.C. § 2510 et seq. The State of Michigan never appealed and attempted to come to this Court directly by a Petition for Writ of Certiorari for which the Petition was denied. Thereafter the State of Michigan commenced litigation in the United States District Court for the Eastern District of Michigan. Summary judgment was entered on the grounds that Title 18, U.S.C. § 2510 et seq. did not violate the Tenth Amendment of the U.S. Constitution and that Congress did have the power under the commerce clause to regulate illegal wiretapping, including the prohibition of the

use of any evidence derived therefrom in, among several areas, state courts (§ 2515). An appeal was made to the United States Court of Appeals, Sixth Circuit and that court sustained the dismissal, but for other reasons, including the fact that the State had not used their own procedural steps in appealing the dismissal through the state courts.

At this particular time what is at issue is whether the State of Michigan is immune from the provisions of Title 18, U.S.C. § 2515, that no evidence shall be received in any hearing in its courts when an electronic recording is tainted.

The Complaint was filed in the within matter by the State of Michigan on the grounds that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and more particularly § 2515 therein, is unconstitutional pursuant to the Tenth Amendment of the United States Constitution and therefore is not applicable or binding upon the states.

Intervening Appellees aver that the State of Michigan has failed to read the Senate Report set forth in the United States Code, Congressional and Administrative News, 90th Congress, Second Session, 1968, Vol. 2, Legislative History, which had clearly indicated that the basis of Title III is to protect the right of privacy and that it has nothing whatsoever to do with the Tenth Amendment.

Also, case law is cited in support of Intervening Appellees' position.

REASONS FOR DENYING THE WRIT

I.

TITLE 18, U.S.C. § 2515 IS INAPPLICABLE TO THE STATES PURSUANT TO THE TENTH AMENDMENT, OR, IN THE ALTERNATIVE, CONGRESS DOES HAVE THE AUTHORITY TO BIND STATES UNDER THE "WIRETAP LAW" PURSUANT TO THE COMMERCE CLAUSE.

The commerce clause of the United States Constitution, Art. I, § 8, Cl. 1 and 3 state as follows:

> "The Congress shall have Power
>
> * * *
>
> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), this Court held that the Surface Mining Control and Reclamation Act was constitutional and did not violate the commerce clause or the Tenth Amendment of the United States Constitution. This Court held that if there is any rational basis for

such finding it must defer to congressional findings that regulate activities which affect interstate commerce. Further, the denomination of an activity as "local" or "intrastate" activity does not resolve the question of whether Congress may regulate it under the commerce clause, but commerce power extends to those activities intrastate which so affect interstate commerce, or exertion of power of Congress over it, as to make regulation of them appropriate means for attainment of legitimate end, the effective execution of the granted power to regulate interstate commerce. See United States Constitution, Art. I, § 8, Cl. 3, supra. In Hodel, supra, this Court held that in order for a state to succeed in its claim that the congressional commerce power legislation is invalid under the Tenth Amendment, the state must satisfy three requirements: (1) THERE MUST BE A SHOWING THAT THE CHALLENGED STATUTE REGULATES STATES AS STATES; (2) THAT

THE FEDERAL REGULATION MUST ADDRESS MATTERS THAT ARE INDISPUTABLY ATTRIBUTES OF STATE SOVEREIGNTY; AND (3) IT MUST BE APPARENT THAT STATES' COMPLIANCE WITH FEDERAL LAW WOULD DIRECTLY IMPAIR THEIR ABILITY TO STRUCTURE INTEGRAL OPERATIONS IN AREAS OF TRADITIONAL FUNCTIONS.

This Court further held in Hodel, supra, that the Tenth Amendment did not limit congressional power to preempt or displace state regulation of private activities affecting interstate commerce. Congress does not invade areas reserved to the states by the Tenth Amendment simply because it exercises its authority under the commerce clause in a manner that displaces the states' exercise of their police powers.

In the case at bar, there is no question that recording of phone conversations off of the telephone involves interstate commerce. See Duncan v. United States, 48 F.2d 128

(D.C. Ore. 1931) where the court stated, among other things, that the transmission of ideas by telephone or telegraph is regulated by Congress pursuant to the commerce clause, citing Pensacola T. Co. v. W.U., 96 U.S. 1, 24 L.Ed. 708 and Western Union Teleg. Co. v. Pendleton, 122 U.S. 347, 7 S.Ct. 1126, 30 L.Ed. 1187. In Duncan, supra, it was held that in regulating interstate commerce Congress may exercise police power which, in the absence of such delegation to the federal government, would be exclusively within the police power of the state. The determinative point is whether or not the Constitution does delegate to the United States police power which, in the absence of such delegation, could only be exercised by the states. The Duncan court further discussed the power of Congress under the constitutional grant to regulate commerce between the states pursuant to U.S. Const., Art. I, § 8, cl. 7 such as the Mann Act, violation of the child labor laws,

and the violation of the mail fraud statute, etc. The Duncan court further held that the power of Congress to regulate interstate commerce could only be accomplished by prohibiting those acts which could only be effectuated by the evil intended.

The Duncan court cited Clark v. U.S., (C.C.A.), 211 F. 916 wherein the Federal Criminal Code of 1909 was sustained as a constitutional exercise of the power of Congress to regulate interstate commerce.

In United States v. Darby, 312 U.S. 100, 312 U.S. 657, 81 S.Ct. 451, 85 L.Ed. 609 (1941) it was held that Congress' power under the interstate commerce clause was the power to prescribe the rule by which commerce is to be governed, and it extends to those regulations which aid, foster and protect the commerce, and further embraces those which prohibit it. The power of Congress over interstate commerce is complete in itself, may be exercised to its utmost extent, and

acknowledges no limitations other than are prescribed by the Constitution, and that power can neither be enlarged nor diminished by the exercise or nonexercise of state power, citing U.S. Const., Art. I, § 8, cl. 3. In Darby, supra, this Court held that Congress, following its own conception of public policy concerning restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined may conceived to be injurious to the public health, morals or welfare even though the state has not sought to regulate their use, and such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of the articles of commerce within the states of destination and is not prohibited unless by other constitutional provisions. It was further held in Darby, supra, that there was no objection to the assertion by Congress of the power to

regulate interstate commerce in that its exercise is attended by the same incidents which attend the exercise of the police power of the states. The purpose of regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. Whatever Congress' motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the commerce clause.

If the State of Michigan is correct, then, of course, Congress would not have the power to restrict illegal wiretapping of phone conversations or air transmittal of many types of communications, whether it be voice or whether it be by electronic means. Such communications could be intercepted and used for any purpose.

A further clarification of the power of Congress to regulate interstate commerce, prohibit the use and dissemination of illegal wiretaps and prohibit the use of evidence in any hearing, etc. pursuant to Title 18, U.S.C. § 2515 is set forth in Hunter v. Underwood, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). It was held in Hunter that the Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment. In the case at bar, the State of Michigan has failed to recognize that the First, Fourth and Fifth Amendments are made applicable to the states by the Fourteenth Amendment.

In United States v. Von Stephens, 774 F.2d 1411 (C.A. 9 1985) it was held that the application of the federal theft statute to defendant's unlawful receipt and cashing of warrants did not violate the state's rights under the Tenth Amendment. This was a valid exercise of congressional power under the

constitutional section allowing Congress to provide for the general welfare, and does not violate a state's rights under the Tenth Amendment, citing U.S. Const., Art. I, § 8, cl. 1. In Von Stephens, supra, the court held that the Tenth Amendment provides that the powers that are not delegated to the United States by the Constitution are reserved to the states. Art. I, § 8, cl. 1 allows Congress to provide for the general welfare of the United States which includes preventing of illegal wiretaps, as well as Art. I, § 8, cl. 3 granting Congress plenary power to regulate commerce among the states.

In United Transportation Union v. Long Island Railroad Company, 455 U.S. 678, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982), it was held that the Tenth Amendment did not prohibit application of the Railway Labor Act to a state-owned railroad engaged in interstate commerce since operation of the railroad was clearly not an integral part of traditional state

activities generally immune from federal regulations.

Furthermore, in Scarborough v. United States, 431 U.S. 563, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977) this Court discussed the constitutionality of a particular provision which was in violation of Title 7 of the Omnibus Crime Control and Safe Streets Act of 1968, being Title 18, U.S.C. §§ 1201-1203. One of the petitioner's defense was that merely possessing a firearm was not a nexus "between the states" so that the court lacked jurisdiction over him and he should not have been tried and convicted. The trial court held that it was not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across state line, nor must the government prove who did purchase the gun. All that had to be demonstrated was that the firearm possessed by a convicted felon had previously traveled in

interstate commerce. The Scarborough court then held that the theories raised by the defendant could create serious loop holes in the congressional plan to "make it unlawful for a firearm . . . to be in the possession of a convicted felon," citing 114 Cong. Rec. 14773 (1968).

Like Scarborough, in this particular instance, if the State of Michigan is correct, then illegal wiretapping can run rampant because the federal government has no control over interstate commerce of telephone lines, telegraph lines and the like. Furthermore, one the hidden dangers which the grand jury judge in Wayne County recognized was that this would encourage, rather than prevent or deter, police to have illegal wiretappings made, mail the tape anonymously to themselves, and then use the same in court as evidence against the participants in such phone conversations; whereas, Title 18, U.S.C. § 2510 et seq. has built-in safeguards for warrants being issued

for legal wiretaps. The State of Michigan's proposition would allow state officers to run amuck, among other things, and encourage other violations by private citizens. See People v. Warner, 401 Mich. 186, 258 N.W.2d 385 (1977) where the State of Michigan itself recognized the constitutionality of Title 18, U.S.C. § 2510 et seq.

The attorney general of Michigan has failed to differentiate between the constitutionality of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as to the states versus the interpretation and the application of Title 18, U.S.C. § 2510 et seq. to particular instances. It appears that what the Michigan attorney general was attempting to do was have the United States District Court act as an appellate court to the State of Michigan, Circuit Court for the County of Wayne, Grand Jury Judge, as to that judge's interpretation and applicability of the wiretap law in a particular instance that was heard before him.

II.

SECTION 2515 OF TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 IS BINDING UPON THE STATES PURSUANT TO AMENDMENTS OTHER THAN THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the United States Code, Congressional and Administrative News, 90th Congress, Second Session, 1968, Vol. 2, Legislative History, p.2113, the purpose of the Omnibus Crime Control and Safe Streets Act of 1968 has been set forth as follows:

> "Title III prohibits all wiretapping and electronic surveillance by persons * * * . This proposed legislation conforms to the constitutional standards set out in Berger v. New York [87 S.Ct. 1873, 388 U.S. 41 (1967)], and Katz v. United States [88 S.Ct. 507, 389 U.S. 347 (1967)]."

Furthermore, the Senate Report at pp. 2153-54 states:

> "Title III is essentially a combination of S. 675, the Federal Wire Interception Act, introduced by Senator McClellan on January 25, 1967, and S. 2050, the Electronic Surveillance Control Act of 1967, introduced by Senator Hruska on June 29, 1967. Subsequent to the introduction of S. 675, the U.S. Supreme Court, on June 12, 1967, handed down the decision in

Berger v. New York, 87 S.Ct. 1873, 388 U.S. 41, which declared unconstitutional the New York State statute authorizing electronic eavesdropping (bugging) by law-enforcement officers in investigating certain types of crimes. The Court held that the New York statute, on its face, failed to meet certain constitutional standards. In the course of the opinion, the Court delineated the constitutional criteria that electronic surveillance legislation should contain. Title III was drafted to meet these standards and to conform with Katz v. United States, 88 S.Ct. 507, 389 U.S. 347 (1967).

Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. To assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause. The only exceptions to the above prohibition are: (1) the power of the President to obtain information by such means as he may deem necessary to protect the National from attack or hostile acts of a foreign power, to obtain intelligence information essential to the Nation's security, and to protect the internal security of the United States from those who advocate its overthrow by force or other unlawful means; (2) employees of the Federal Communications Commission

may, in the normal course of employment, intercept and disclose wire communications in the discharge of the monitoring responsibilities discharged by the Commission in the enforcement of chapter 5 of title 47 of the United States Code; and (3) employees of a communication common carrier may intercept and disclose wire communications in the normal course of their employment while engaged in any activity necessary to the rendition of service, or protection of the rights or property of the carrier of such communication."

The Senate Report further noted at p. 2154:

"The first case in which the Supreme Court considered the status of wiretapping was Olmstead v. United States, decided in 1928, 48 S.Ct. 564, 277 U.S. 438. It held that the tapping of telephone wires and the use of the intercepted messages did not constitute an unreasonable search and seizure under the Fourth Amendment, there being no trespass into constitutionally protected areas and no seizure of anything tangible.

* * *

Soon after the enactment of the Federal Communications Act, the Supreme Court held in Nardone v. United States, 58 S.Ct. 275, 302 U.S. 379 (1937), that evidence obtained by wiretapping in violation of section 605 was inadmissible in Federal courts. The decision was based not on constitutional grounds, but rather on the Court's supervisory powers over Federal courts and officers."

At p. 2155 the Senate Report states as follows:

> "Thus the Supreme Court has effectively prevented the use in both Federal and State courts of intercepted communications by wiretapping, as well as the fruits thereof. State officers would be subject to Federal prosecution and, therefore, most State prosecutors do not use such evidence, although it is authorized by their State statutes."

At p. 2157 the Senate Report defined the purpose of Title III as follows:

> "The major purpose of title III is to combat organized crime."

At p. 2159 the Senate Report states as follows:

> "The principal argument of those who oppose wiretapping and electronic surveillance by law enforcement officers on court order is that it will destroy our right of privacy."

In further discussing Title III, the Senate Report states as follows at p.2161:

> "Organized criminals must hold meetings to play plans. Where the geographical area over which they operate is large, they must use telephones. Wiretapping and electronic surveillance techniques can intercept these wire and oral communications.
>
> * * *
>
> Debate over the constitutionality of wiretapping and electronic surveillance

techniques has raged insistently since the Court decided in 1928 in Olmstead v. United States, 48 S.Ct. 564, 277 U.S. 438 (1928), that wiretapping accomplished without a physical trespass into a constitutionally protected area did not violate any provision of the Constitution. That debate has taken many forms. It has posted many hypotheses. All of them need not now be considered, for the Court itself now has authoritatively set down the constitutional standards in this area on the use of these techniques in Berger v. New York, 87 S.Ct. 1873, 388 U.S. 411 (1967), and Katz v. United States, 88 S.Ct. 507, 389 U.S. 347 (1967).

The Berger decision reversed by a vote of 6 to 3 the conviction, secured through a court-ordered eavesdrop, of a New York public relations man for conspiracy to bribe the chairman of the New York State Liquor Authority. In declaring the New York eavesdropping statute unconstitutional, the Court held that (1) a conversation is within the fourth amendment's right to privacy protections, and the use of electronic devices to seize conversations is a search within the meaning of that amendment; (2) the language of the New York statute was so broad that it resulted in a trespassory intrusion into a constitutionally protected area and is violative of the fourth and 14th amendments; and (3) evidence obtained by an eavesdrop which violates the fourth amendment must be excluded in State courts."

The Senate Report further held on p.2162 as follows:

> "On certiorari the Supreme Court held that the Government's activities in electronically listening to and recording petitioner's words constituted an unlawful search and seizure within the fourth amendment and reversed the conviction.
>
> * * *
>
> In concluding, the Court held that the Government agents ignored the procedure of antecedent justification that is central to the fourth amendment, and a procedure the Court held to be a constitutional pre-condition of the kind of electronic surveillance involved in this case.
>
> Working from the hypothesis that any wiretapping and electronic surveillance legislation should include the above constitutional standards, the subcommittee has used the Berger and Katz decisions as a guide in drafting title III. Each section of title III is discussed in detail in the analysis section of this title, including those provisions which are intended to conform to the Berger and Katz decisions."

In discussing the importance of banning of the use of improperly obtained information from illegal wiretaps, the Senate Report held as follows:

> "Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in

> evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. The provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly. * * * AND IT IS NOT LIMITED TO CRIMINAL PROCEEDINGS. SUCH A SUPPRESSION RULE IS NECESSARY AND PROPER TO PROTECT PRIVACY." (Emphasis Added) (p. 2184-5).

IN MICHIGAN, WIRETAPPING OR ELECTRONIC EAVESDROPPING IS BARRED AS TO ALL, BOTH THE PUBLIC AUTHORITIES AS WELL AS PRIVATE PERSONS. [See M.C.L. § 750.539(a) et seq.]

The Senate Report clearly indicates at p. 2189 the importance of Section 2518 of Title III as follows:

> "Section 2518 of the new chapter sets out in detail the procedure to be followed in the interception of wire or oral communications.
>
> * * *
>
> Subparagraph (a) requires the identity of the person who makes, and the person

> who authorized the application to be set out. This fixes responsibility.
>
> * * *
>
> Each of these requirements reflects the constitutional command of particularization [Berger v. New York, 87 S.Ct. 1873, 388 U.S. 41, 58-60 (1967); Katz v. United States, 88 S.Ct. 507, 389 U.S. 347, 354-56 (1967)]."

In the case of Berger v. New York, 87 S.Ct. 1873, 388 U.S. 41, 18 L.Ed.2d 1040 (1967) the Court held that a conversation is within the Fourth Amendment's protections and use of electronic devices to capture it is a "search" within the meaning of the U.S.C.A. Const. Amend. 4. The Court further held that the Fourth Amendment's right of privacy is enforceable against states through due process clause of the Fourteenth Amendment.

In Berger, supra, Justice Clark delivered the opinion on behalf of the Court in discussing the eavesdropping statute of New York as follows:

> "We have concluded that the language of New York's statute is too broad in its sweep resulting in a trespassory intrusion

> into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments. This disposition obviates the necessity for any discussion of the other points raised."

In Berger, supra, the Supreme Court discussed the development of bugging and wiretapping and then discussed the first wiretap case of Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) and the scientific development of electronic devices used for bugging and wiretapping from that day forward and also the exclusionary rule of evidence along with the Fourth Amendment's protections. The Berger Court further held as follows:

> "It is now well settled that 'the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961). 'The security of one's privacy against arbitrary intrusion by the police--which is at the core of the Fourth Amendment--is basic to a free society.' Wolf v. People of the State of Colorado, 338 U.S. 25, 27, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782 (1949). And its 'fundamental protections * * * are guaranteed * * * against invasion by the

States.' Sanford v. State of Texas, 379 U.S. 476, 481, 85 S.Ct. 506, 509, 13 L.Ed.2d 431 (1965). This right has most recently received enunciation in Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930. 'The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' At 528, 87 S.Ct. at 1730. Likewise the Court has decided that while the 'standards of reasonableness' required under the Fourth Amendment are the same under the Fourteenth, they 'are not susceptible of Procrustean application * * *.' Ker v. State of California, 374 U.S. 23, 33, 83 S.Ct. 1623, 1630, 10 L.Ed.2d 726 (1963). We said there that 'the reasonableness of a search is * * * (to be determined) by the trail court from the facts and circumstances of the case and in light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment.' Ibid."

Furthermore, in Berger the Court held as follows:

"In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While'[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement.' Lopez v. United States, supra, at 464, 83 S.Ct. at 1404 (dissenting opinion

of Brennan, J.), it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certainly and--what is more important--without attending illegality.

It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the 'fruits' of eavesdropping devices are barred under the Amendment. On the other hand this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices. See Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322; On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270; Lopez v. United States, supra; and Osborn v. United States, supra. In the latter case the eavesdropping device was permitted where the 'commission of a specific offense' was charged, its use was 'under the most precise and discriminate circumstances' and the effective administration of justice in a federal court was at stake. The States are under no greater restrictions. The Fourth Amendment does not make the 'precincts of the home or the office * * * sanctuaries where the law can never reach,' Douglas, J., dissenting

> in Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 321, 87 S.Ct. 1642, 1657, 18 L.Ed.2d 782, but it does prescribe a constitutional standard that must be met before official invasion is permissible. Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does."

In Payton v. New York and Riddick v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the Supreme Court held that Fourth Amendment to the United States Constitution is made applicable to states by the Fourteenth Amendment.

In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), it was held that the government's activities in electronically listening to and recording defendant's words spoken into a telephone receiver in a public telephone booth violated the privacy upon which the defendant justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the Fourth Amendment, and the

fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth could have no constitutional significance. Furthermore, the Fifth Amendment, to some extent, reflects the Constitution's concern for the right of each individual to a private enclave where he may lead a private life. Under the Fourth Amendment, the protection of a person's general right to privacy, this is, his right to be let alone by other people, is, like the protection of his property and of his very life, left largely to the law of the individual states. The First Amendment imposes limitations upon governmental abridgment of freedom to associate and privacy in one's associations. Searches conducted outside the judicial process without prior approval by a judge or a magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. What a person seeks to preserve

as private, even in an area accessible to the public, may be constitutionally protected under the Fourth Amendment. Footnote 5 holds:

> "The First Amendment, for example, imposes limitations upon governmental abridgment of 'freedom to associate and privacy in one's associations.'"

Further under Footnote 5, it is held:

> "To some extent, the Fifth Amendment too "reflects the Constitution's concern for * * * '* * * the right of each individual 'to a private enclave where he may lead a private life.'" Tehan v United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution."

The Court further held:

> "* * * For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312; United States v. Lee, 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688; Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877."

The Court continued:

> "He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." (Footnotes omitted).

The Court further stated:

> "Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under * * * local property law.' Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people--and not simply 'areas'--against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot

turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance."

In Gelbard v. United States, 408 U.S. 41, 48, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972), at page 46 the Court held as follows:

"In Title III, Congress enacted a comprehensive scheme for the regulation of wiretapping and electronic surveillance. See United States v. United States District Court, 407 U.S. 297, 301-306. Title III authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given except upon compliance with stronger conditions. 18 U.S.C. §§2516, 2518(1)-(8). If a wire or oral communication is intercepted in accordance with the provisions of Title III, the contents of the communication

> may be disclosed and used under certain circumstances. 18 U.S.C. §2517. Except as expressly authorized in Title III, however, all interceptions of wire and oral communications are flatly prohibited. Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, 18 U.S.C. §2511(1), and the victim of such interception, disclosure, or use is entitled to recover civil damages, 18 U.S.C. §2520. Title III also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, 18 U.S.C. §2515, and provides procedures for moving to suppress such evidence in various proceedings, 18 U.S.C. §2518(9)-(10)."

Furthermore, the Court in Gelbard, supra, held as follows:

> "The unequivocal language of §2515 expresses the fundamental policy adopted by Congress on the subject of wiretapping and electronic surveillance. As the congressional findings for Title III make plain, that policy is strictly to limit the employment of those techniques of acquiring information:
>
> > 'To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should

> further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.' §801(d), 82 Stat. 211.'

The Senate committee report that accompanied Title III underscores the congressional policy:

* * *

Hence, although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern.[7] Indeed, the congressional findings articulate clearly the intent to utilize the evidentiary prohibition of §2515 to enforce the limitations imposed by Title III upon wiretapping and electronic surveillance:

* * *

And the Senate report, like the congressional findings, specifically addressed itself to the enforcement, by means of §2515, of the limitations upon invasions of individual privacy:

* * *

Section 2515 is thus central to the legislative scheme. Its importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear.[9] The purposes of §2515 and Title III as a whole would be subverted were the plain command of §2515 ignored when the victim of an illegal interception is

called as a witness before a grand jury and asked questions based upon that interception. Moreover, §2515 serves not only to protect the privacy of communications,[10] but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.' Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that §2515 bars in unequivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents." (Emphasis Added) (pp. 47-51)

RELIEF REQUESTED

WHEREFORE, Intervening Appellees move that the Appellants' request for relief be denied.

Respectfully submitted,

LAWRENCE J. STOCKLER & ASSOCIATES, P.C.

BY _____
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Dated: November 7, 1988

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,

Plaintiff,

vs. Civ. No. 87-CV-70865-DT

EDWIN MEESE, ATTORNEY GENERAL FOR THE UNITED STATES,

Defendant,

and

STEVE ASMAR and METRO INSTITUTIONAL FOOD SERVICES, INC.,

Intervening Defendants.
_____/

AMENDED OPINION AND ORDER

I.

This is an action for a declaratory judgment. 28 U.S.C. § 2201; Fed. R. Civ. P. 57. Plaintiff, the State of Michigan, seeks a declaration that Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 ("the

Act"), 18 U.S.C. §§ 2510-2520,[1] violates the

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[1]The case focuses on section 2515, which provides in full:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury . . . of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2511 provides in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who -
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavoer to intercept, any wire or oral communication;
>
> * * *
>
> (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(Footnote Continued)

Tenth Amendment of the United States Constitution[2] as applied to the states. Section 2515 of Title 18 prohibits, inter alia, a state or political subdivision from introducing as evidence in any proceeding the contents, or fruits thereof, of a communication intercepted in violation of section 2511.

(Footnote Continued)

> (d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both. Pub. L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216. The Electronic Communications Privacy Act of 1986, Pub. L. 99-508 (effective January 20, 1987), comprehensively revised Title III but preserved section 2515 without amendment.

[2]"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Plaintiff argues that the only conceivable justification for the Act is the Commerce Clause of the Constitution. Art. 1, § 8, cl.3. Plaintiff recognizes that the United States Supreme Court has affirmed the wide scope of the Commerce Clause even as applied to the states, but relies on language in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), that can be construed as having left open the possibility that the Tenth Amendment might impose some "affirmative limits . . . on federal action affecting the States under the Commerce Clause." Id. at 556. Plaintiff contends that the Act exceeds such affirmative limits.

The complaint mainly addresses legal questions, not facts. Its statement of the facts of the underlying "controversy" is limited to the following:

> Plaintiff is in receipt of a recording of telephone conversations containing evidence of public corruption. The recording was delivered anonymously, and recorded by a person or persons

> unknown. 18 USC 2511 and 2515 are preventing investigation of these apparent acts of public corruption.

The "recording" is an audio cassette tape recording that has been the subject of considerable dispute in civil matters on the Court's docket. Jo-Dan, Ltd., Inc. v. Detroit Board of Education, No. 86-CV-72565-DT; A & M Corp. v. Landmark Shoppe, Inc., No. 86-CV-72738-DT; Asmar v. Detroit News, Inc., No. 86-CV-73390.

Plaintiff did not allege that a prosecution is advancing in which a state prosecutor will attempt to introduce as evidence the recording or evidence derived therefore. The complaint did allege that the United States Supreme Court had previously declined to assert original jurisdiction over the matter.[3]

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[3]Plaintiff apparently sought to invoke the Supreme Court's original, but not exclusive, jurisdiction over controversies between the United States and a State. See 28 U.S.C. § (Footnote Continued)

Concerned that the case was not "ripe" for judicial consideration, the Court issued an Order to Show Cause on March 13, 1987, giving both parties an opportunity to comment on whether a "case or controversy" exists, as required by Art. III, § 2, cl. 1 of the Constitution. The Order noted that plaintiff appeared to be seeking "an advisory decree upon a hypothetical state of facts." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 325 (1936), cited in Advisory Committee Notes to Rule 57, supra. The Order also noted that a federal court will not declare on the constitutionality of aspects of an investigation

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(Footnote Continued)
1251(b)(2). The complaint states that the Supreme Court declined leave to plaintiff to file a bill of complaint in this matter and that the Solicitor General opposed plaintiff's application on the ground that the federal district is a more appropriate original forum. The Supreme Court's one sentence order expressed no opinion as to the appropriate forum in this matter. State of Michigan v. Meese, 107 S.Ct. 1274 (1987).

in progress. See Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1100-03 (D.C. Cir. 1985). Finally, the Order stated that it does not appear that "all parties having an interest [in the declaration sought] or adversely affected [have been] made parties or be[en] cited." Advisory Notes, supra.

Plaintiff's response to the Order to Show Cause revealed that the Wayne County Citizens Grand Jury issued subpoenas in an investigation related to matters disclosed on the tape recording of various telephone conversations, including officials of the Detroit Board of Education, intercepted in probable violation of 18 U.S.C. § 2515. Following a motion in Wayne County Circuit Court to quash the subpoenas based on the Act, a Wayne County circuit judge supervising the grand jury quashed the subpoenas on June 18, 1986, citing the Act as the basis for his decision. Plaintiff filed the state court order quashing

the subpoenas and a transcript of the extensive hearing on the motion. Plaintiff argued that the state judge's action created a "case or controversy" because it deprived the State of the only means of investigating the matters discussed in the conversations on the tape.

Defendant filed a response to the Order to Show Cause on April 13, 1987. Defendant, who is joined in the case because he is "charged with the responsibility of enforcing the laws of the United states,"[4] agreed with plaintiff that the matter is ripe for judicial consideration. Defendant asserted that purely legal questions are involved and unlikely to be clarified by further factual development. See Thomas v. Union Carbide Agricultural Productions Co., 473 U.S. 568, 581 (1985); Babbitt

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[4]The Attorney General is a proper party to any action affecting the interests of the United States. See 28 U.S.C. §§ 516, 517, 2403(a); see also Fed. R.Civ. P. 24(c).

v. United Farm Workers National Union, 442 U.S. 289, 300-01 (1979).

For the reasons stated on the record of the hearing on May 4, 1987, the Order to Show Cause was dismissed by Order of May 5. On May 22, the intervening defendants - one of whom admits involvement in the intercepted conversations - moved to intervene either as of right, Fed. R. Civ. p. 24(a)(2), or by permission, Fed. R. Civ. P. 24(b)(2). The motion was granted on June.

Now before the Court are cross-motions for summary judgment. Fed. R. Civ. P. 56. There are no disputes over facts, as the case presents a purely legal question. The parties have ably briefed the issue, and the Court has conducted its own analysis beyond the scope of the briefs.

For the reasons that follow, defendant's Motion is GRANTED and the case is DISMISSED.

II.

A.

This case clearly poses a question about the limits of the principle of federalism and its embodiment in the Bill of Rights, the Tenth Amendment. Much has been said of late about federalism and the role of the judiciary. Compare, e.g., The Status of Federalism in America (Reporting of the Working Group on Federalism of the Domestic Policy Council, Nov., 1986) (bemoaning the failure of the Supreme Court to overrule more Congressional statutes), and Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985) (criticizing Garcia, supra), with J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980) (proposing that the Supreme Court rule such federalism issues to be nonjusticiable questions that must be left to the political branches).

At least two state courts have noted that section 2515 involves questions of federalism

when applied to state court proceedings that are traditionally of state concern. Compare In re Marriage of Lopp, 378 N.E.2d 414, 421 (Ind. 1978) (refusing to apply section 2515 under circumstances of case), cert. denied, 439 U.S. 1116 (1979), with Halpin v. Superior Court of San Bernardino County, 495 P.2d 1295, 1305 (Cal.) (rejecting Tenth Amendment challenge to section 2515), cert. denied, 409 U.S. 982 (1972). One constitutional scholar has noted that, in general, the "[e]xpansion of federal criminal jurisdiction raises some of the most sensitive problems of potential congressional impingement upon the values of federalism." G. Gunther, Constitutional Law Cases and Materials 194 (9th ed. 1978).

B.

However divergent may be the political, academic, and state court views regarding federalism, the Court is bound to look for guidance in the decisions of the Supreme Court of the United States. The issue is not decided

in a legal vacuum. The Supreme Court has considered the scope of the Tenth Amendment, even though its teachings on that subject may be in a state of flux. Briefly, however, this much can be said: there is not a single case that can be considered "good law" that purports to overrule a federal statute on the ground that it violates the Tenth Amendment.

In Usery v. National League of Cities, 326 U.S. 833 (1976), the Supreme Court struck down a federal minimum wage statute for state employees as violative of the Tenth Amendment. After Usery, however, the Supreme Court declined to invalidate a single federal law applicable to the states on the ground that it interferes with their autonomy under the Tenth Amendment. Now, even Usery is no longer the law. With the Supreme Court's decision in Garcia, supra, which overruled Usery, the Tenth Amendment has become a dead letter in constitutional law.

Subsequent to Garcia, it is not clear what standard applies to issues like the one before the Court. Garcia seems to have discarded Usery's "balancing" test. See 469 U.S. at 564 n.7 (Powell, J., dissenting). But see id. at 579-80 (Rehnquist, J., dissenting) (disagreeing that Usery announced a "balancing" test). However, Garcia fails to "identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." Id. at 556. Indeed, the State of Michigan admits that "it is difficult to conceive a method of analysis for the question here at issue." While the State has attempted to fill this void with some imaginative legal and political analysis, it does not lead to the declaration it seeks.

C.

The Supreme Court is unlikely to accept the State's argument here, since the Supreme Court has applied the exclusionary rule - a judicial supervisory rule not required by the

Constitution, see United States v. Leon, 468 U.S. 897, 905-06 (1984) - to the States, with the same result as here of suppressing evidence the State seeks to introduce in a prosecution. Under the exclusionary rule, states ar bound to exclude evidence in some cases even where governmental agents obtained the evidence in subjective good faith (as, for example, where an officer's seizure of the evidence under a facially deficient warrant is not objectively reasonable). Leon, 468 U. S. at 922-23. The Supreme Court has already noted that, as the exclusionary rule was understood at the time, section 2515 proscribes such evidence not only to deter misconduct by governmental agents but also to preserve the integrity of court proceedings, i.e., "to ensure that the courts do not become partners to illegal conduct." Gelbard v. U.S., 408 U.S. 41, 49-51 & n.8 (1972) (quoting the Congressional findings that precede Title III, § 801 (b), 82 Stat. 211). Thus, the State's

argument here that its agents did nothing reprehensible in obtaining the recording at issue is not relevant.

Another persuasive example against the State's position is the Supreme Court's requirement that state courts exclude confessions obtained in violation of the familiar Miranda warning (or an adequate state equivalent). Here, the Supreme Court has imposed on state criminal proceedings a judicially-designed rule of evidence not required by the Constitution. See Michigan v. Tucker, 417 U.S. 433, 444 (1974). The result is to exclude in some cases evidence voluntarily given and constitutionally obtained. See Michigan v. Mosely, 423 U.S. 96, 100 (1975); Tucker, supra, 417 U.S. at 443.

By enacting section 2515, Congress requires exclusion of illegally obtained electronic recordings, which is a form of obtaining an incriminating statement without informed consent or proper safeguards against intrusion

of privacy. The State does not say why, if it is legitimate for the Supreme Court to promote the integrity of the courts through rules of criminal procedure, Congress may not do the same. In Olmstead v. United States, 277 U.S. 438 (1927), the Supreme Court endorsed the power of Congress to make intercepted telephone conversations inadmissible whereas the courts might lack such power under the Fourth Amendment (as understood at that time). Id. at 465-66. Indeed, the legislative history of section 2515 indicates that Congress largely intended to reflect existing search and seizure law. See S.Rep. No. 1097, 90th Cong. 2d Sess. 66, 96, reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2185.

The State concedes that Congress may forbid private persons from intercepting conversations without authorization, but simply argues that the State may subsequently use evidence privately intercepted even if its own agents could not have legally made the initial

seizure. While the Supreme Court has accepted this argument where Congress has not spoken, see United States v. Jacobsen, 466 U.S. 109 (1984), the Supreme Court has disallowed state use of such evidence where Congress has spoken, as in section 605 of the Communications Act of 1934, the predecessor of section 2515. See Lee v. Florida, 392 U.S. 3789 (1968).[5] The State correctly points out that the Supreme Court in Lee did not address the Tenth Amendment issue. Nonetheless, the Supreme Court's subsequent pronouncements on the Tenth Amendment and continued application of the exclusionary rule to state courts

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[5]The Court in Lee stated: "We conclude . . . that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effectively available way - by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. 206, 317 (1960)." 392 U.S. at 386-87. The Court of Appeals for the First Circuit recently reached the same conclusion under the current section 2515. United States v. Vest, 813 F.2d 477 (1st Cir. 1987).

suggest it would not overrule Lee or the statutory basis for that decision.

In enacting section 2515, Congress noted, "Only by striking at all aspects of the problem can privacy be adequately protect." S. Rep. No. 1097, supra, at 69 (quoted in Gelbard, supra, 408 U.S. at 50), reprinted in 1968 U.S. Code Cong. & Admin. News 2156. In making this statement, Congress indicated that it considers judicial exclusion of improperly obtained communications "necessary and proper" to execute its other intentions in Title III. See S. Rep. No. 1097, supra, at 96, reprinted in 1968 U.S. Code Cong. & Admin. News 2185 (asserting power found at Art. 1, § 8, cl. 18). As noted above, these other intentions include judicial integrity, which, as also noted earlier, was dispositive in the Supreme Court's decision in Lee to uphold the predecessor statute to section 2515. In short, Congress agrees with the Supreme Court that a bright-line rule of exclusion is best suited to protect

the federal the federal interests at stake. Such bright-line rules are always best addressed in the political arena rather than in the courts, since they evolve against the background of law developed on an ad hoc basis by the courts. See Professor Herbert Wechsler's seminal work on this subject, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Reve. 543, 545 (1954).

Where, as here, the State concedes Congress's power (absent consideration of the Tenth Amendment) to enact such a law, the Tenth Amendment does not impose an independent limitation on Congress that permits a court to reject Congress's view that a narrow aspect of a statute is "necessary" to

effectively implement its larger purposes.[6] As

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[6]Porfessor Van Alstyne has noted the Supreme Court's general refusal to substitute its view of what is "necessary" for that of Congress when federalism concerns are involved. "Usually, . . . even in close cases when the federalism claims has failed (as most often it has indeed failed), it has failed because the Court has yielded to an assertion of some overriding federal interest it deemed adequate to rationalize the exceptional intrusiveness of the challenged act." The Second Death of Federalism, supra, 83 Mich. L. Rev. at 1722 & n.61. See Fry v. United States, 421 U.S. 542, 548 (1975) (upholding application of federal wage restraints as a national emergency measure); Testa v. Katt, 330 U.S. 386 (1947) (upholding binding nature of penal provisions of Emergency Price Control Act on state courts under supremacy clause); Case v. Bowles, 327 U.S. 92 (1946) (upholding application of the Emergency Price Control Act against Tenth Amendment challenge).

While not explicitly considering the Tenth Amendment issue, the Courth as several times struck state judicial procedural rules in order to further a federal legislative goal or protect a federal statutory right. See International Longshoreman's Ass'n, AFL-CIO v. Davis, 106 S.Ct. 1904 (1986) (striking state pleading rule to protect preemption of National Labor Relations Act); Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) (striking state procedural rule to protect right of recovery under Federal Employes' Liability Act); Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949) (same); see also Chapman v.

(Footnote Continued)

stated by Justice Story: "It is plain, therefore, that it could not have been the intention of the framers of this [Tenth] amendment to give it effect, as an abridgement of any of the powers granted under the constitution, whether they are express or implied, direct or incidental." 3 Commentaries on the Constitution § 1901 (1833), in V The Founders' Constitution, 406 (P. Kurland & R. Lerner ed. 1987).

There is nothing peculiar about Congress's intrusion under the Commerce Clause into state criminal proceedings that compels a different conclusion. Admittedly, there is little discussion by the Founding Fathers of the meaning of the Tenth Amendment as it relates to criminal laws and their administration. This is to be expected, since it was

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(Footnote Continued)
California, 386 U.S. 18 (1967) (imposing federal interpretation of "harmless error rule" over that of state).

presumed that all powers in such matters not given to the United States would continue, unenumerated, within the states as before. However, there is a pertinent reference by President James Monroe on this subject: "[T]he administration of justice, and the whole criminal code, except in cases of breaches of the laws of the United States made under and in conformity with the powers vested in Congress . . . are regulated by State laws." The Founders' Constitution, supra, at 405., reprinting in part Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822) (emphasis added). This statement evidences that one of the few Founding Fathers[7] who may have said anything

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[7]While some may disagree with the characterization of Monroe as a "Founding Father," he participated substantially in the formation of the Republic, including the debates about the principle of federalism, and was familiar with the thinking of the greater

(Footnote Continued)

on the subject did not consider the Tenth Amendment to establish any special limitation on Congress simply because it may choose to exercise its vested power in the criminal arena.

Currently, constitutional doctrine regarding the Tenth Amendment has reverted to its pre-Usery state, to wit, the Tenth Amendment is no more than a truism; it tautologically states that powers not given to the federal government are reserved to the states. The Court recognizes the avowed intent of Chief Justice Rehnquist in his Garcia dissent to resurrect Usery. 469 U.S. at 580. Perhaps a majority of the Supreme Court will do so as its

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(Footnote Continued)
men who overshadowed him during that era. Monroe studied law under Thomas Jefferson beginning in 1780. From 1783 to 1786 he served in the Congress under the Articles of Confederation. He was chosen a member of the Virginia House of Delegates in 1787 and, in 1788, a member of the state convention at which Virginia ratified the new federal Constitution.

composition changes and shifts in its politics and philosophy of constitutional adjudication.

As noted by Professor Herbert Wechsler, "Federalism would have few adherents were it not, like other elements of government, a means and not an end." The Political Safeguards of Federalism, supra, at 552. A return to Usery would likely be considered to "politicize" the Constitution, which the defendant has cautioned against elsewhere.[8] The

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[8]See Remarks of the Attorney General at the American Studies Center Bicentennial Program in Washington, D.C. (June 12, 1987). The printed version of the Attorney General's address states at 2: "Too often the Constitution has been, in a word, politicized. The modern-day politicization of our supreme law has been encouraged primarily by political and judicial liberals . . ." Commentators have noted, however, that Usery was a conservative politcal doctrine. A leading treatise on constitutional law describes the rise of Usery as follows: "There is little or no explanation for the shift in the Court's position regarding the judicially enforceable nature of the tenth amendment other than the political background and philosophy of the newly appointed justices. The decisions of the 1970's,

(Footnote Continued)

long-standing view, however, has been that the Tenth Amendment will not support political goals:

> The attempts, then, which have been made from time to time, to force upon this language [the Tenth Amendment] an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words, or the sense of the instrument. Stripped of the ingenious disguises, in which they are clothed, they are neither more nor less, than attempts to foist into the test the word "expressly;" to qualify, what is general, and obscure, what is clear, and defined. They make the sense of the passage bend to the wishes and prejudices of the interpreter; and employ criticism to support a theory, and not to guide it. . . . [Constitutions] are not to

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(Footnote Continued)
attacking the established principle of judicial deference to congressional decisions regarding federalism issues were joined only by Republican justices. Those justices were Blackmun, Powell, Rehnquist, Stewart (who was replaced by the even more states' rights oriented Justice O'Connor) and Chief Justice Burger." J. Nowak, R. Rotunda & J. Young, Constitutional Law 162 n.33 (ed ed. 1986). Ultimately, the doctrinal "glue" holding together the Usery approach proved so weak that it could not hold even a majority of a conservative Court, as reflected in the change of mind by Justice Blackmun, who concurred in Usery but wrote the opinion of the Court in Garcia only nine years later.

> be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders.

Story, Commentaries, supra, §1901, in V The Founders' Constitution, supra, at 407.

III.

Even if the Garcia dictum on which the State relies makes the Tenth Amendment fertile soil for planting the seeds of a states' rights movement, it would ill behoove a federal district judge to say so by declaring unconstitutional an act of Congress in so important an area as here. Much has been said of late regarding the evils of activist judges who strain to overrule legislation enacted by the elected representatives of the people. If those elected to serve in Washington should desire to constrain the actions of their governments back home, far be it from this Court to tell them that they cannot do so. See Garcia, 469 U.S. at 556. See generally The Political Safeguards of Federalism, supra.

If the Constitution forbids the Act, it is for someone else to say.

SO ORDERED.

AVERN COHN
United States District Judges

Dated: August 10, 1987
Detroit, Michigan

APPENDIX B

NOT FOR PUBLICATION

No. 87-1719

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

EDWIN MEESE, Attorney General for the United States,

Defendant-Appellee,

and

STEVE ASMAR & METRO INSTITUTIONAL FOOD SERVICES, INC.,

Intervening Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: JONES and RYAN, Circuit Judges; and GIBSON, District Judge.*

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*The Honorable Benjamin F. Gibson, United States District Judge for the Western District of Michigan, sitting by designation.

PER CURIAM. The State of Michigan, brought this declaratory judgment action asking the district court to find that 18 U.S.C. § 2515, which excludes from evidence in all state criminal and civil trial, conversations which were recorded in violation of the federal wiretapping statutes, is beyond the scope of Congress' Commerce Clause power and therefore violative of the tenth amendment. The district court dismissed plaintiff's action. We affirm.

A Wayne County, Michigan grand jury issued subpoenas based on privately tape recorded telephone conversations anonymously given to state prosecutors. A Michigan state court quashed the subpoenas, holding that the evidence was obtained in violation of Title 111 of the Omnibus Crime Control Act and Safe Streets Act of 1968, 18 U.S.C. § 2515. The state court's action ended the grand jury investigation.

On March 10, 1987, the State of Michigan filed suit in federal district court against the Attorney General of the United States, seeking a declaratory judgment that 18 U.S.C. § 2515 was violative of the tenth amendment. Section 2515 states:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515.

The State of Michigan argued that § 2515 required the suppression of evidence where the state was not a party because of § 2511 which states in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who--
>
> > (a) intentionally intercepts, endeavors to intercept, or procures any

other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when--

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

. . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511. Plaintiff argued that requiring suppression of the evidence was beyond the Congress' Commerce Clause power, under which the Crime Control Act was passed.

The district court issued a show cause order as to ripeness. The parties agreed there was a case or controversy within article 111 of the Constitution. Thereafter, on cross-motions for summary judgment, the district court found that the exclusionary rule found in 18 U.S.C. § 2515 was constitutional as an exercise of Congress' Commerce Clause power.

Although both parties agreed below that this case was ripe for adjudication, the United States Attorney General now argues that there is no "case or controversy" pursuant to article 111 of the Constitution and, therefore, this court lacks subject matter jurisdiction. The judicial power of the federal government is limited to that provided for by article 111.

> Article 111 of the Constitution limits the "judicial power" of the United States to the resolution of "cases" and "controversies." The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity "to adjudge the legal rights of litigants in actual controversies." Liverpool S. S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). The requirements of Art 111 are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892).

Valley Forge Christian College v. Americans United for Separation of Church and State 454 U.S. 464, 471 (1982). If there is no case or controversy, this court lacks subject matter jurisdiction to hear this appeal even though the parties agreed below that the case

was right for adjudication; agreement of the parties cannot establish subject matter jurisdiction. In re Rini, 782 F.2d 603, 609 .10 (6th Cir. 1986).

The Supreme Court, discussing the limits of article III power, has stated:

> [A]t an irreducible minimum, Art 111 requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976).

Valley Forge Christian College, 454 U.S. at 472. Thus, the plaintiff, in the instant case, must show that (1) it has suffered actual or threatened injury, which it clearly has through the quashing of the subpoenas, and (2) the injury was the result of an act of the defendant. "The court may not act to redress injury 'that results from the independent action of some third party not before the

court.'" Toth v. United Auto. Aero. & Agr. Implement Workers, 743 F.2d 398, 404 (6th Cir. 1984) (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42 (1976)). It is the second element which the plaintiff fails to satisfy.

Plaintiff's injury did not result from any action taken by the defendant, the Attorney General of the United States. Rather, it was the state trial court judge who quashed the subpoenas and enforced the federal statute, 18 U.S.C. § 2515. The Attorney General has not threatened plaintiff with any penalty for attempting to use the taped conversations which are the subject of this litigation. Plaintiff's remedy is to appeal the state court's decision through the state court system.

Because defendant herein has not caused the injury suffered by the plaintiff, this court is without subject matter jurisdiction to hear this appeal. Although the district court dismissed the instant action on the merits, this

court may affirm the district court for reasons other than those stated by the lower court. Russ' Kwik Car Wash v. Marathon Petroleum Co., 772 F.2d 214, 216 (6th Cir. 1985).

For the reasons stated above the decision of the district court is AFFIRMED.

ISSUED AS MANDATE: July 28, 1988

COSTS: NONE